

# Customs Bulletin

Regulations, Rulings, Decisions, and Notices  
concerning Customs and related matters



## and Decisions of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 21

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THE DEPARTMENT OF THE TREASURY  
U.S. Customs Service

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# U.S. Customs Service

## *Treasury Decisions*

(T.D. 87-17)

### FOREIGN CURRENCIES

#### DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: January 1, 1987.

Greece drachma:	
January 2, 1987 .....	\$.007257
Israel shekel:	
January 2, 1987 .....	N/A
South Korea won:	
January 2, 1987 .....	.001156
Taiwan N.T. dollar:	
January 2, 1987 .....	N/A

(LIQ-03-01 S.COM CIE)

Dated: January 2, 1987.

ANGELA DeGAETANO,  
*Chief,*  
*Customs Information Exchange.*

(T.D. 87-18)

## FOREIGN CURRENCIES

## DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151) has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

## Greece drachma:

January 5, 1987 .....	\$.007207
January 6, 1987 .....	.007241
January 7, 1987 .....	.007223
January 8, 1987 .....	.007246
January 9, 1987 .....	.007273

## Israel shekel:

January 5-9, 1987 .....	N/A
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## South Korea won:

January 5-7, 1987 .....	.001156
January 8-9, 1987 .....	.001157

## Taiwan N.T. dollar:

January 5, 1987 .....	N/A
January 6, 1987 .....	.028161
January 7, 1987 .....	.028185
January 8, 1987 .....	.028201
January 9, 1987 .....	.028217

(LIQ-03-01 S:COM CIE)

Dated: January 9, 1987.

ANGELA DeGAETANO,

Chief,

Customs Information Exchange.

(T.D. 86-19)

## FOREIGN CURRENCIES

## DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151) has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for

the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:		
January 12, 1987	.....	\$.007342
January 13, 1987	.....	.007375
January 14, 1987	.....	.007491
January 15, 1987	.....	.007463
January 16, 1987	.....	.007446
Israel shekel:		
January 12-16, 1987	.....	N/A
South Korea won:		
January 12, 1987	.....	.001157
January 13, 1987	.....	.001158
January 14-15, 1987	.....	.001159
January 16, 1987	.....	.001160
Taiwan N.T. dollar:		
January 12, 1987	.....	.028241
January 13, 1987	.....	.028265
January 14, 1987	.....	N/A
January 15, 1987	.....	.028297
January 16, 1987	.....	.028329

(LIQ-03-01 S:COM CIE)

Dated: January 16, 1987.

ANGELA DeGAETANO,  
*Chief,*  
*Customs Information Exchange.*

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(T.D. 87-20)

## FOREIGN CURRENCIES

### DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151) has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: January 19, 1987.

Greece drachma:		
January 20, 1987	.....	\$.007465
January 21, 1987	.....	.007435
January 22, 1987	.....	.007559
January 23, 1987	.....	.007553
Israel shekel:		
January 20-23, 1987	.....	N/A
South Korea won:		
January 20, 1987	.....	.001161
January 21-22, 1987	.....	.001160
January 23, 1987	.....	.001161
Taiwan N.T. dollar:		
January 20, 1987	.....	N/A
January 21, 1987	.....	.028417
January 22, 1987	.....	.028433
January 23, 1987	.....	.028441

(LIQ-03-01 S:COM CIE)

Dated: January 23, 1987.

ANGELA DeGAETANO,  
*Chief,*  
*Customs Information Exchange.*

(T.D. 87-21)

## FOREIGN CURRENCIES

## DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:		
January 26, 1987	.....	\$.007496
January 27, 1987	.....	.007541
January 28, 1987	.....	.007686
January 29, 1987	.....	.007619
January 30, 1987	.....	.007446
Israel shekel:		
January 26-30, 1987	.....	N/A

South Korea won:		
January 26-28, 1987 .....		.001160
January 29, 1987 .....		.001161
January 30, 1987 .....		.001162
Taiwan N.T. dollar:		
January 26, 1987 .....		.028466
January 27, 1987 .....		.028474
January 28, 1987 .....		.028474
January 29-30, 1987 .....		N/A

(LIQ-03-01 S.COM CIE)

Dated: January 30, 1987.

ANGELA DeGAETANO,  
*Chief,*  
*Customs Information Exchange.*

(T.D. 87-22)

## FOREIGN CURRENCIES

## VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87-3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Belgium franc:		
January 14, 1987 .....		\$.026316

(LIQ-03-01 S.COM CIE)

Dated: January 16, 1987.

ANGELA DeGAETANO,  
*Chief,*  
*Customs Information Exchange.*

(T.D. 87-23)

## FOREIGN CURRENCIES

## VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87-3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: January 19, 1987.

Austria schilling:	
January 22, 1987 .....	\$.078401
January 23, 1987 .....	.078034
Belgium franc:	
January 22, 1987 .....	.026560
January 23, 1987 .....	.026420
Brazil cruzado:	
January 21, 1987 .....	.063175
January 22, 1987 .....	.062531
January 23, 1987 .....	.062531
Denmark krone:	
January 22, 1987 .....	.145370
Germany deutsche mark:	
January 22, 1987 .....	.551116
January 23, 1987 .....	.547645
Netherlands guilder:	
January 22, 1987 .....	.488759
January 23, 1987 .....	.485673
Republic of South Africa rand:	
January 22, 1987 .....	.48550
Switzerland franc:	
January 22, 1987 .....	.656814

(LIQ-03-01 S:COM CIE)

Dated: January 23, 1987.

ANGELA DeGAETANO,  
Chief,  
Customs Information Exchange.

(T.D. 87-24)

## FOREIGN CURRENCIES

## VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 5151), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87-3 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

## Austria schilling:

January 26, 1987	\$.077900
January 27, 1987	.078709
January 28, 1987	.079554
January 29, 1987	.079428

## Belgium franc:

January 26, 1987	.026420
January 27, 1987	.026695
January 28, 1987	.026991
January 29, 1987	.026961
January 30, 1987	.026385

## Brazil cruzado:

January 26, 1987	.061862
January 27, 1987	.061508
January 28, 1987	.061508
January 29, 1987	.060812
January 30, 1987	.060470

## Denmark krone:

January 26, 1987	.144613
January 27, 1987	.145730
January 28, 1987	.147820
January 29, 1987	.147384

## Finland markka:

January 28, 1987	.221976
January 29, 1987	.221729

## France franc:

January 27, 1987	.165700
January 28, 1987	.167645
January 29, 1987	.167616

Germany deutsche mark:	
January 26, 1987 .....	.548396
January 27, 1987 .....	.553863
January 28, 1987 .....	.559128
January 29, 1987 .....	.559597
Italy lira:	
January 28, 1987 .....	.000786
January 29, 1987 .....	.000785
Netherlands guilder:	
January 26, 1987 .....	.486263
January 27, 1987 .....	.491159
January 28, 1987 .....	.495663
January 29, 1987 .....	.496032
Norway krone:	
January 28, 1987 .....	.144300
January 29, 1987 .....	.143947
Republic of South Africa rand:	
January 28, 1987 .....	.49100
January 29, 1987 .....	.48800
Switzerland franc:	
January 26, 1987 .....	.652529
January 27, 1987 .....	.659848
January 28, 1987 .....	.665336
January 29, 1987 .....	.665115

(LIQ-03-01 S:COM CIE)

Dated: January 30, 1987.

ANGELA DeGAETANO,  
*Chief,*  
*Customs Information Exchange.*

# United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

*Chief Judge*

Edward D. Re

*Judges*

Paul P. Rao  
James L. Watson  
Gregory W. Carman  
Jane A. Restani

Dominick L. DiCarlo  
Thomas J. Aquilino, Jr.  
Nicholas Tsoucalas

*Senior Judges*

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CONTENTS

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VOL. 40, PART 1, 1910

CONTENTS

# Decisions of the United States Court of International Trade

(Slip Op. 87-5)

UNITED STATES, PLAINTIFF *v.* LUN MAY CO., INC., AND AMERICAN MOTORISTS  
INSURANCE CO., DEFENDANTS

AMERICAN MOTORISTS INSURANCE CO., THIRD-PARTY PLAINTIFF, *v.* MAY M.  
LAM, A/K/A HOMAY LAM, THIRD-PARTY DEFENDANT

Court No. 86-04-00433

Before DiCARLO, *Judge*.

Plaintiff brings an action against an importer and its surety to collect liquidated damages under a bond pursuant to 28 U.S.C. § 1582(2). The importer, Lun May Co., Inc. (Lun May), counterclaims against plaintiff for damages relating to transactions covered by the bond. Plaintiff moves to dismiss the counterclaim or alternatively for a more definite statement of Lun May's claim.

*Held:* Under 28 U.S.C. § 1583 parties in any civil action in the Court of International Trade may raise counterclaims which involve the imported merchandise that is the subject matter of such civil action. Defendant may not raise claims relating to merchandise outside the scope of the action. Defendant must file a more definite statement of its claim as it relates to the merchandise which is the subject of the action.

[Plaintiff's motion for a more definite statement is granted.]

(Decided January 9, 1987)

*Richard K. Willard*, Assistant Attorney General, *Joseph I. Liebman*, Director, Commercial Litigation Branch, Civil Division, Department of Justice (*Nancy E. Reich*) for plaintiff.

*Soller, Singer & Horn (William C. Shayne)* for defendant, Lun May Co., Inc.

*Russotti & Barrison (Harvey Barrison)* for defendant and third-party plaintiff, American Motorists Insurance Company.

*Marshall Beil* for third-party defendant, May M. Lam.

## MEMORANDUM OPINION AND ORDER

DiCARLO, *Judge*: This is an action brought by the United States pursuant to 28 U.S.C. § 1582(2) to collect liquidated damages in the amount of \$50,499.00 plus interest from an importer and its surety for alleged breaches of an immediate delivery and consumption entry bond. In its answer, defendant Lun May Co., Inc. (Lun May), the importer of record and principal under the bond, counterclaims

against the government in the amount of \$225,000.00. The government moves to dismiss Lun May's counterclaim and alternatively seeks an order requiring Lun May to file a more definite statement of its counterclaim. The government's motion to require a more definite statement is granted.

The complaint alleges that defendant Lun May as principal and defendant American Motorist Insurance Company (American Motorist) as surety executed an immediate delivery and consumption entry bond on September 14, 1979, under which defendants jointly and severally agreed to pay all duties, taxes and liquidated damages resulting from the importation of merchandise covered by the bond, and further agreed to export any merchandise covered by the bond found not to comply with the laws and regulations of the United States, and if in default thereof, to pay to the District Director of Customs an amount equal to the value of the merchandise plus estimated duties as liquidated damages.

The government contends that on six occasions between September 1979 and April 1980, an entry of foodstuffs covered by the bond was released to Lun May, that samples of the entries were taken under the authority of section 801(a) of the Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. § 381 (1982), and that the Food and Drug Administration notified Lun May on each occasion that the goods were in violation of section 801(a)(3), FDCA, 21 U.S.C. § 381 (a)(3), and therefore admission into the United States was refused. The notices of refusal sent to Lun May required that the merchandise be exported under the supervision of the United States Customs Service (Customs) within 90 days. The complaint alleges that no proof of exportation or destruction under Customs supervision has been provided, that liquidated damages were assessed and notices sent to American Motorist, and that neither Lun May nor American Motorist have paid the assessed liquidated damages despite demands by Customs. The government seeks judgment in the amount of the combined entered value of the six entries of merchandise, plus interest.

In its answer, Lun May denies any liability under the bond and, as an affirmative defense, says that the complaint fails to state a claim upon which relief can be granted for lack of specificity. Lun May also alleges the following counterclaim:

- [1.] During the period of 1979 through 1985, United States Customs did demand from defendant LUN MAY the sum of \$225,000 representing various claims for liquidated damages.
- [2.] During this period of time payments were made to the United States Customs Service for liquidated damages.
- [3.] Customs in numerous instances failed to follow its own procedure regarding these claims.

- [4.] The Food and Drug Administration failed to follow its procedure regarding the merchandise covered by the Customs claims.

WHEREFORE, defendant LUN MAY respectfully requests that this court enter judgment in favor of LUN MAY CO., INC. dismissing the government's complaint and enter judgment in favor of LUN MAY against the United States in the total amount \$225,000 plus interest and grant such other and further relief to defendant as the court deems just and appropriate.

The government argues that the counterclaim consists of vague allegations which do not sufficiently set forth minimum facts needed to establish jurisdiction, and that the counterclaim must be amended or dismissed.

Counterclaims in the United States Court of International Trade are provided for under 28 U.S.C. § 1583 (1982), which states:

In any civil action in the Court of International Trade, the court shall have exclusive jurisdiction to render judgment upon any counterclaim, cross-claim, or third-party action of any party, if (1) such claim or action involves the imported merchandise that is the subject matter of such civil action, or (2) such claim or action is to recover upon a bond or customs duties relating to such merchandise.

The question whether Lun May may raise its counterclaim in this action depends upon whether the counterclaim "involves the imported merchandise that is the subject matter of" the main action.

Lun May's counterclaim refers to liquidated damages claims made by the government during the period 1979 through 1985. The scope of the counterclaim extends well beyond the period September 1979 through April 1980, during which time the merchandise underlying the government's claim was entered.

Lun May argues that the scope of permissible counterclaims in this action should not be limited to claims concerning the six entries that are the subject of the government's action pursuant to 28 U.S.C. § 1582(2). It states:

The scope of the action commenced by the Government in this case is with respect to the bond. Therefore the term "imported merchandise" as it relates to the scope of the counterclaim in an action commenced by the Government, not on particular merchandise, but on a bond, must necessarily be the same as the scope of the bond. This would, by necessity, include *all* imported merchandise entered under the terms of the bond by the importer, regardless of whether included in the particular entries brought before the court by the Government.

Brief for Lun May at 4.

Lun May's position is based on its interpretation of the legislative history of the Customs Courts Act of 1980, which states that section 1583 "would permit the Court of International Trade to dispose of

all claims arising out of the same underlying transaction in the one proceeding, which it must conduct in any event." H. Rep. No. 96-1235, 96th Cong., 2d Sess. 37, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3749.

The Court finds that the legislative history is in harmony with the plain meaning of the statute, which says that counterclaims must relate to "the imported merchandise that is the subject matter of such civil action \* \* \*" 28 U.S.C. § 1583. *See* H. Rep. No. 96-1235, 96th Cong. 2d Sess. 49 *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3761 ("The proposed section allows a counterclaim \* \* \* to be asserted if it involves the imported merchandise which is the subject matter of the civil action before the court.") The Court holds that Lun May may only raise claims relating to the six entries which are the subject of this civil action.

To the extent that Lun May has a claim with respect to the merchandise that is the subject of this action, it may assert a counterclaim under section 1583. However, such a claim must be set forth with greater particularity. Lun May states:

Defendant will upon return of discovery materials by the government amend its counterclaim and set forth with greater particularity the elements of entries, merchandise and issues of this counterclaim.

Brief for Lun May at 6.

Lun May's discovery requests are currently the subject of a motion by the government for a protective order. The government argues that discovery should be postponed until after the Court rules on its motion for summary judgment, which is currently before the Court. Lun May opposes the motion for a protective order and on December 11, 1986 it cross-moved for an order to compel discovery and for an extension of time until after the government has complied with its discovery requests to respond to the government's motion for summary judgment. Lun May's response to the summary judgment motion was due on December 15, 1986. Defendant American Motorist has filed its response to the motion for summary judgment.

The Court will hold a conference within 5 days to determine if discovery is appropriate before Lun May must file its opposition to plaintiff's motion for summary judgment. Should the Court find that the motion for summary judgment is grounded solely upon questions of law, Lun May's motion to compel discovery will be denied and it must file its opposition to defendant's motion for summary judgment.

Lun May shall file within 10 days any counterclaim setting forth a claim for relief with respect to the subject merchandise. If Lun May makes such a claim, and should discovery be required on that claim, the Court may enter a separate scheduling order and trial

date on the counterclaim under Rules 13(h) and 42(b) of the Rules of the Court.

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(Slip Op. 87-6)

CHEMICAL PRODUCTS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-11-01541

Before DiCARLO, *Judge*.

[The action is dismissed.]

(Decided January 13, 1987)

*Gibson, Dunn & Crutcher (Joseph H. Price and Robert M. Kruger)* for plaintiff.  
*Richard K. Willard*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, Department of Justice (*A. David Lafer*) for defendant.

#### MEMORANDUM OPINION AND ORDER

DiCARLO *Judge*: Chemical Products Corporation (CPC), a domestic producer of barium chloride, challenges a final determination by the United States Department of Commerce, International Trade Administration (Commerce) that barium chloride from the People's Republic of China (PRC) is being sold in the United States at less than fair value. *Barium Chloride from the People's Republic of China* 49 Fed. Reg. 33916 (1984). CPC alleged that Commerce had improperly underestimated the constructed foreign market value of barium chloride based on costs in Thailand under 19 U.S.C. § 1677b(c)(2) (1982).

On November 6, 1986, the Court held that Commerce had not erred in making its determination by (1) calculating the value of natural gas used as an energy source at one PRC plant based on the cost of coal in Thailand; (2) using data from Brazil rather than from Thailand in determining inland freight rates; and (3) employing the minimum eight percent profit factor in calculating profit under 19 U.S.C. § 1677b(c)(1)(b)(ii) (1982 & Supp. II 1984) and 19 C.F.R. § 353.6(a)(2) (1984). The Court remanded the case, however, finding that Commerce had erred by (1) allocating factors of production between barium chloride and hydrogen sulfide gas on a quantity basis rather than on a value basis, and (2) failing to include in its estimation of constructed value the cost of calcium chloride, a factor of production used at one PRC barium chloride plant. *Chemical Products Corp. v. United States*, 10 CIT —, Slip Op. 86-115 (1986).

On January 2, 1987, defendant, with the consent of plaintiff, filed a motion for vacatur of the remand order and for entry of final judgment sustaining the challenged determination on the ground that Commerce has completed its first administrative review of the determination pursuant to 19 U.S.C. § 1675(a) (1982), the results of which will govern duty assessments on unliquidated entries covered

by the final determination as well as the estimated duty deposit rate for future entries. In the final results of the administrative review Commerce, following the Court's decision, stated:

In accordance with the recent decision of the Court of International Trade in *Chemical Products Corp. v. United States*, — CIT —, Slip Op. 86-115 (1986), we calculated a value for the calcium chloride input on the basis of the value of calcium chloride in Thailand rather than on the basis of the transportation cost of salt brine containing calcium chloride. Also in accordance with that decision, we did not allocate a portion of the factors of production to the coproduct hydrogen sulfide gas (HSG) on the basis of quantities produced. The Court ruled that the allocation must "reflect the difference in the value of the products." However, being unable to obtain a value for HSG in Thailand, we had no basis for allocating factors between the two products. Therefore, as the best information available, we allocated no portion of the factors of production to HSG.

*Barium Chloride From the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 52 Fed. Reg. 313, 314 (Jan. 5, 1987).

Defendant's motion to vacate the order of remand is granted. Judgment will be entered accordingly. So ORDERED.

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(Slip Op. 87-7)

FUNDICAO TUPY S.A. AND TUPY AMERICAN FOUNDRY CORP., PLAINTIFFS V.  
UNITED STATES, DEFENDANT

Court No. 86-06-00765

Before RE, *Chief Judge*.

#### MEMORANDUM OPINION AND ORDER OF ASSIGNMENT

[Plaintiff's motion for the chief judge to designate a three-judge panel to hear and determine the case is granted.]

(Dated January 13, 1987)

*Freeman, Wasserman & Schneider* (Jack Gumpert Wasserman and Patrick C. Reed on the motion), for the plaintiffs.

*Rickard K. Willard*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*J. Kevin Horgan* on the motion), for the defendant.

RE, *Chief Judge*: Plaintiffs, Fundicao Tupy S.A. and Tupy American Foundry Corporation, challenge a "final" injury determination made by the International Trade Commission (ITC). The ITC's determination pertained to the importation of malleable cast-iron pipe fittings from Brazil. Plaintiffs also challenge the affirmative less-than-fair-value determination which was made by the International Trade Administration (ITA) of the Department of Commerce.

This action is unassigned, and, pursuant to the provisions of 28 U.S.C. § 255(a) (1982) and USCIT Rule 77(d)(2), plaintiffs move before the chief judge for its assignment to a three-judge panel.

The question presented is whether the contentions and reasons set forth by the plaintiffs, taken together, warrant a finding that the action raises issues which justify the assignment of this action to a three-judge panel. Since the chief judge finds that the issues raised by plaintiffs in this action have "broad or significant implications in the administration or interpretation of the customs laws," the motion for a three-judge panel is granted.

In an antidumping proceeding, the ITC must determine whether an industry in the United States is materially injured, or threatened with material injury, by the imports of merchandise from a particular country. See 19 U.S.C. § 1673d(b)(1) (1982). Before making this determination, the ITC is directed by statute to consider (1) the volume of the imports, (2) the effect of the imports on prices in the United States for like products, and (3) the impact of the imports on domestic producers of like products. Tariff Act of 1930, § 771 (7)(B), (C), 19 U.S.C. § 1677 (7)(B), (C) (1982). When the imports are from two or more countries, for purposes of volume and price, the ITC is directed to

cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.

Trade and Tariff Act of 1984, § 612(a)(2)(A), 19 U.S.C. § 1677(7)(C)(iv) (Supp. III 1985) (cumulation statute).

In this case, the ITC cumulatively assessed the volume and effect of imports from Brazil, Korea, and Taiwan. The ITC entered a final affirmative injury determination for all three countries. *Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan*, 51 Fed. Reg. 18,670 (1986).

Plaintiffs contend that the ITC's finding of injury, as to the imports from Brazil, is based on an incorrect and improper interpretation of section 612, the cumulation statute, and raises issues of great significance in the administration of the nation's customs laws. In support of this contention, plaintiffs refer to the increasing number of antidumping and countervailing duty investigations from two or more countries which will be directly affected by the ITC's interpretation. Plaintiffs also note that the application of the cumulation statute in the context of a "final" injury determination presents a question of first impression for this Court.

In addition, plaintiffs contend that the ITC's interpretation of the cumulation statute is inconsistent with the international General Agreement on Tariffs and Trade (GATT) Antidumping and Subsidy Codes, to which the United States adheres. See 19 U.S.C. § 2503(a), (c)(6). Finally, plaintiffs contend that the ITC's determination "raises an issue of the constitutionality of an Act of Congress, as in-

terpreted by the Commission." Specifically, plaintiffs contend that (1) under the ITC's interpretation of the cumulation statute, the provisions of the antidumping statute become unintelligible and vague; (2) the cumulation statute allows discrimination against imports of a particular country with no rational relation to the statutory purpose; and (3) the ITC's interpretation of the cumulation statute interferes with the President's constitutional authority to conduct foreign affairs.

Defendant opposes the motion which requests the assignment of this action to a three-judge panel. Defendant maintains that the issue of an individual country's causation, within the meaning of the cumulation statute, is not a sufficient reason to assign this case to a three-judge panel. Defendant also contends that, if after consideration of the merits, a single-judge court reverses the ITC's determination that the imports from Brazil compete with imports from Korea and Taiwan, the issue of the ITC's final determination would be rendered moot. Hence, the defendant submits that the granting of plaintiffs' motion "may result in an unnecessarily wasteful application of judicial resources."

Defendant stresses that this court has acted through a single judge in previous judicial review of the cumulation statute. Furthermore, issues of first impression, or those that involve possible conflicts with the GATT, "routinely" have been assigned for determination to a single-judge court. See, e.g., *Bingham & Taylor v. United States*, 10 CIT —, 627 F. Supp. 793 (1986); *United States Steel Corp. v. United States*, 9 CIT —, 618 F. Supp. 496 (1985). Finally, defendant characterizes the constitutional issue which plaintiffs raise as "no more than a claim that the ITC's interpretation of an act of Congress is erroneous." This issue, defendant asserts, is "routinely" decided by a single-judge court, and does not warrant assignment to a three-judge panel. See, e.g., *Mast Industries, Inc. v. Regan*, 8 CIT 214, 596 F. Supp. 1567 (1984).

The authority of the chief judge to designate a three-judge panel of the Court to hear and determine a case is found in Title 28 U.S.C. §§ 253(c), 255(a) (1982).

Section 253(c) of Title 28 provides:

The chief judge, under rules of the court, may designate any judge or judges of the court to try any case, and when the circumstances so warrant, reassign the case to another judge or judges.

28 U.S.C. § 253(c).

Section 255 provides:

(a) Upon application of any party to a civil action or upon his own initiative, the chief judge of the Court of International Trade shall designate any three judges of the court to hear and determine any civil action which the chief judge finds:

- (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or
- (2) has broad or significant implications in the administration or interpretation of the customs laws.

(b) A majority of the three judges designated may hear and determine the civil action and all questions pending therein.

28 U.S.C. § 255(a), (b) (1982).

It is well established that the decision to designate a three-judge panel lies within the sound discretion of the chief judge. *See, e.g., Barnhart v. United States*, 5 CIT, 201, 204-205, 563 F. Supp. 1387, 1390 (1983); *Farr Man & Co. v. United States*, 1 CIT 104, 106 (1980); *see also SCM Corp. v. United States*, 79 Cust. Ct. 163, 166, CRD 77-6, 435 F. Supp. 1224, 1227 (1977). In exercising this discretion, the chief judge must find that the issues presented satisfy either of the two statutory criterion set forth in section 255(a). *See* 28 U.S.C. § 255(a)(1), (2). The chief judge must also consider whether the benefits and advantages of a decision by a three-judge panel outweigh the benefits derived from the "more efficient utilization of judicial resources" provided by a single judge. H.R. Rep. No. 267, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 3188, 3200.

Congress, in the Customs Court Act of 1970, determined that, in all cases, except as provided in section 255, the judicial power of the court "shall be exercised by a single judge." *See* 28 U.S.C. § 254. The legislative purposes for granting this authority to a single judge were "to permit more efficient utilization of judicial manpower," and to "speed up the final resolution" of disputes. H.R. Rep. No. 267, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News at 3200. Section 255 authorizes the chief judge, in exceptional cases, to designate or convene a three-judge panel. *See* 28 U.S.C. §§ 254, 255(a). The legislative history of sections 254 and 255 makes clear the intent of Congress to conserve judicial resources, and reduce procedural delays by limiting three-judge panels to specified, exceptional situations which raise important issues that would warrant a collegial and broader judicial consideration. *See National Corn Growers Ass'n v. Baker*, 10 CIT —, 643 F. Supp. 626, 630 (1986); H.R. Rep. No. 267, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 3188, 3200-01. As explained in the legislative history, the purpose of the authority conferred upon the chief judge in section 255(a) "is to permit broader representation of the court in deciding landmark or other important issues." H.R. Rep. No. 267, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News at 3201. The statute and its legislative history leave no doubt that the convening of a three-judge panel should be based upon significant questions of law, and that questions of fact, regardless of their complexity or importance, would not justify the designation of a three-judge panel to hear and determine the case.

An important congressional objective of the Customs Courts Act of 1980 was to provide greater uniformity and consistency in the interpretation and application of the nation's international trade laws. See, e.g., H.R. Rep. No. 1235, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Admin. News 3729, 3731. In order to achieve this objective, Congress sought to eliminate jurisdictional conflicts and to expand the opportunities for judicial review. In addition, Congress reaffirmed the 1970 statutory direction for the assignment of cases to a single judge, except in those instances which raise important constitutional issues, or which have a broad or significant impact in the administration of the customs laws. See 28 U.S.C. §§ 254, 255 (1982). Hence, the authority conferred upon the chief judge in section 255 embodies the congressional policy determination that a decision rendered by a three-judge panel contributes to the uniform interpretation and application of the nation's international trade laws.

One may ask how the decision of a three-judge panel would better promote the congressional goals of uniformity and consistency. Several factors contribute to the answer to this important question. It may be stated at the outset that consideration by a three-judge panel fosters "a fuller judicial consideration of the case." *National Corn Growers Ass'n v. Baker*, 10 CIT —, 643 F. Supp. 626, 630 (1986). A "fuller" judicial consideration follows the collegial discussion made possible by a three-judge panel. The synergistic effect of this more thorough, judicial consideration would also promote the national policy of uniformity set forth in Article I, Section 8, of the United States Constitution, which mandates that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8; see Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. at vii (West Supp. 1986). As stated in the *National Corn Growers* case, the "appointment of a three-judge panel ensures that the decision reached will reflect an institutional consensus, and thereby serves to further the statutory and constitutional mandate of uniformity of the international trade laws." *National Corn Growers*, 643 F. Supp. at 630-31.

It is also pertinent to recall that, in addition to settling the controversy between the parties, the judicial decision has precedential value. *National Corn Growers*, 643 F. Supp. at 631. Hence, since the consolidated view of a three-judge panel will reflect an institutional consensus, its decision is likely to be more acceptable and persuasive to individual judges of this Court as well as to judges of the Court of Appeals for the Federal Circuit who may be faced with a similar issue.

In this case, a significant legal question is the ITC's interpretation and application of the cumulation statute. Prior to enactment of the present statute, Congress, in the Trade Act of 1974, recognized that although cumulation was not required as a matter of law, it could be applied by the ITC on a case by case basis. See S.

Rep. No. 1298, 93rd Cong., 2d Sess. 180 (1974). In 1979, Congress made substantial changes and revisions to the antidumping and countervailing duty statutes, but noted that ITC determinations of injury made pursuant to the 1974 Act were, on the whole, "consistent with the material injury criterion of [the 1979 Act.]" See S. Rep. No. 249, 96th Cong., 1st Sess. 87 (1979). The Trade and Tariff Act of 1984, however, amended the law to provide specific circumstances in which the ITC is required to cumulate imports before it determines the existence of material injury or threat of material injury to a domestic industry. See 19 U.S.C. § 1677(7)(C). This change was intended to eliminate inconsistencies in the interpretation and application of the law, and to insure that the injury test adequately addressed simultaneous unfair imports. See H.R. Rep. No. 725, 98th Cong., 2d Sess. at 36-37.

In support of its motion for assignment to a three-judge panel, plaintiffs refer to the increasing number of antidumping and countervailing duty investigations from two or more countries. In addition, plaintiffs assert that "this is a case of first impression which will affect how innumerable antidumping proceedings are conducted." In the *National Corn Growers* case, it was noted that the assertion of "questions of first impression, without more, would not necessarily warrant consideration by a three-judge panel." *National Corn Growers Ass'n v. Baker*, 10 CIT —, 643 F. Supp. 626, 631 (1986). Indeed, it has been stated that cases of novel or first impression are "almost commonplace," and are usually decided by a single-judge court. However, if there are "special factors or exceptional circumstances," and other broad or significant implications in the administration or interpretation of the customs laws, designation of a three-judge panel will further the constitutional and congressional purposes set forth in section 255(a). See *Barnhart v. United States*, 5 CIT 201, 206, 563 F. Supp. 1387, 1391 (1983); *United States v. Accurate Mould Co.*, 3 CIT 155, 157 (1982); H.R. Rep. No. 267, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News at 3201.

To date, no judicial decision has reviewed the ITC's interpretation and application of the cumulation statute in the context of a final injury determination. If a three-judge panel of this court were to determine the proper scope and application of the cumulation statute, that decision would contribute significantly to a uniform interpretation of the nation's antidumping law. In view of the increasingly large number of antidumping and countervailing duty investigations which involve imports of merchandise from two or more countries, the decision in this case will have "broad or significant implications in the administration or interpretation of the customs laws." Therefore, the chief judge finds that the scope and application of the cumulation statute raises sufficiently significant questions of law within the meaning of section 255(a) to warrant the des-

ignation of a three-judge panel of this Court to hear and determine the case.

Additional issues of major importance are raised by the possible conflict of the ITC's interpretation of the cumulation statute with the GATT Antidumping and Subsidy Codes. In view of the specifically stated intention of Congress that the United States comply with the provisions of the GATT Codes, this possibility assumes special significance. See Trade Agreements Act of 1979, § 2, 19 U.S.C. § 2503 (1982); see also S. Rep. No. 249, 96th Cong., 1st Sess. 36 n.18, reprinted in 1979 U.S. Code Cong. & Admin. News 381, 423 n.18.

In 1984, when Congress enacted the Trade and Tariff Act, it reaffirmed its intention to maintain the consistency of United States laws with the GATT Antidumping and Subsidy Codes. The 1984 Act contained the cumulation statute as an amendment to the antidumping and countervailing duty laws. H.R. Rep. No. 725, 98th Cong., 2d Sess. 4, 37, reprinted in 1984 U.S. Code Cong. & Admin. News 5127, 5164. An interpretation and application of the statute which would conflict with the GATT Codes would clearly violate the intent of Congress. This possibility presents an issue that has broad and significant implications in the administration of the international trade laws. Hence, together with the other issues presented, the totality of the issues raised justify the discretion of the chief judge to designate a three-judge panel to hear and determine this case. See *Barnhart*, 5 CIT at 206, 563 F. Supp. at 1291 (citing *Farr Man & Co. v. United States*, 1 CIT 104 (1980)).

Finally, it should be noted that defendant is incorrect when it asserts that "plaintiffs' motion to sever a portion of this case for review by a three-judge panel raises the distinct possibility that the panel will issue what will be, essentially, an advisory opinion." Plaintiffs have not moved to "sever a portion" of the case; instead, plaintiffs have requested a three-judge panel to hear and determine the action. By statute, when a civil action is assigned to a three-judge panel, "a majority of the three judges designated may hear and determine the civil action *and all questions pending therein*." 28 U.S.C. § 255(b) (emphasis added). Thus, the objection that the decision of the three-judge panel would be a mere advisory opinion is without merit.

For the reasons stated, the chief judge finds that the ITC's interpretation and application of the cumulation statute, together with the other questions presented, raise issues of "broad or significant implications in the administration or interpretation of the law." 28 U.S.C. § 255(a) (1982). In view of this finding, it is unnecessary to determine whether plaintiffs' constitutional objections, standing alone, would warrant assignment of this case to a three-judge panel.

Accordingly, plaintiffs' motion that the chief judge designate three judges of the court to hear and determine this action is granted.

It is ORDERED that the following judges of this court serve as members of a three-judge panel:

1. Judge James L. Watson,
2. Judge Dominick L. DiCarlo, and
3. Judge Nicholas Tsoucalas.

Pursuant to 28 U.S.C. § 255(b), the above-named panel of judges of this court shall hear and determine all questions presented in this action. Nothing in this opinion should be interpreted as expressing any view as to the merits of this litigation.

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(Slip Op. 87-8)

MAST INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86-9-01145

Before CARMAN, *Judge*.

[Judgment for Defendant.]

(Decided January 14, 1987)

*Grunfeld, Desiderio, Lebowitz & Silverman (Steven P. Florsheim)* for plaintiff.

*Richard K. Willard*, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Susan Handler-Menahem*) for defendant.

#### OPINION AND ORDER

CARMAN, *Judge*: This case concerns the country of origin question and the doctrine of substantial transformation, as set forth in *Textiles and Textile Products Country of Origin*, 19 C.F.R. § 12.130 (1986), as applied to 100% cotton fabric piece goods manufactured in their most basic, crude form in the People's Republic of China (P.R.C.) and subsequently subjected to certain processes in Hong Kong. The issue before this Court concerns whether or not the merchandise, which is the subject of this action, underwent substantial manufacturing or processing operations in Hong Kong sufficient to transform basic cotton goods, from the P.R.C., into new and different articles of commerce, consequently establishing a new country of origin, *i.e.*, Hong Kong. This Court holds the manufacturing and/or processing operations performed in Hong Kong were not sufficient to establish Hong Kong as the country of origin.

Plaintiff, Mast Industries, Inc. (Mast), commences this action against the defendant, the United States Customs Service (Customs) requesting this Court overrule the Customs' decision denying entry of certain 100% cotton piece goods (fabric) imported by Mast into the United States from Hong Kong. Mast also requests this Court to direct the Regional Commissioner of Customs in New York to forthwith permit entry of this merchandise as a product of Hong Kong. Customs requests this Court overrule plaintiff's claims, sustain the

decision of the appropriate Customs official, dismiss the action, and grant defendant such other and further relief as may be just and appropriate. This Court must examine the propriety of Customs' denial of entry of the Mast fabric in light of the facts and the language of the regulation.

#### FACTS

It is important, as noted in the brief for Customs and the amicus curiae brief submitted by the American Textile Manufacturers Institute, Inc., to examine the background behind the promulgation of 19 C.F.R. § 12.130. There existed a virtual regulatory vacuum for "country of origin" determinations for textile quota purposes prior to the enactment of these regulations. This vacuum apparently resulted in a series of *ad hoc* and unilateral decisions by individual importers on how the textile quotas would actually be administered. The supplemental information contained in Customs Regulations Amendments Relating to Textiles and Textile Products, 50 Fed. Reg. 8710 (1985) (codified at 19 C.F.R. § 12.130) supplies us with an account of what prefaced the promulgation of these regulations:

In order to implement import policies with respect to textiles and textile products, Congress provided authority to the President to negotiate textile restraint agreements in section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and authority to carry out such agreements by issuing regulations governing the entry of merchandise covered by the agreements into the United States.

In December, 1973, representatives of 50 nations meeting under the General Agreement on Tariff and Trade (GATT) aegis, negotiated the Multi-Fiber Arrangement Regarding International Trade in Textiles. The arrangement is usually known as the Multi-Fiber Arrangement, or MFA, and came in force on January 1, 1974. It was subsequently renewed and next expires on July 31, 1986.

Under the MFA, the U.S. has negotiated numerous bilateral restraint agreements. The U.S. also has several bilateral agreements with MFA non-signatories. The Committee for the Implementation of Textile Agreements (CITA) was established by Executive Order 11651 on March 3, 1972, to supervise the implementation of textile agreements. The future administration of these agreements was severely jeopardized by the decision of the United States Court of International Trade in *Cardinal Glove Co. v. United States* 4 C.I.T. 41, which concluded that, absent specific regulatory authority to the contrary, the bilateral textile agreement at issue therein was applicable only to textile products in which the agreement country was the "country of exportation." Furthermore, the U.S., Customs Service was faced with an ever increasing number and variety of instances where attempts had been made to circumvent the textile import program.

There was no guidance available concerning "country of origin" determinations for textile quota purposes. There was no substantive regulation, no specific documentation required, and no substantial judicial guidance. There were also few relevant Customs Service rulings. The Federal Register's comments on the background to the regulations, as quoted above, continue:

In part because of these problems and in order to prevent circumvention or frustration of the various multilateral and bilateral agreements to which the U.S. is a party and to facilitate efficient and equitable administration of the U.S. Textile Import Program, the President signed Executive Order 12475 on May 9, 1984. Under the Executive Order the Secretary of the Treasury was required to promulgate regulations governing the entry of textiles and textile products subject to section 204, Agricultural Act of 1956 within 120 days of the May 11, 1984, effective date of the Executive Order. Interim Customs Regulations implementing the Executive Order were published in the Federal Register on August 3, 1984 as T.D. 84-171 (49 FR 31248). Customs further requested public comment on the interim regulations. Over 650 comments were received in response to the solicitation of comments. A discussion of the interim regulations, comments received, changes made to the interim regulations during the comment period and further changes made by this document as a result of the comments are set forth below.

50 Fed. Reg. at 8711.

On March 5, 1985, the Commissioner of Customs issued the "country of origin" regulation, 19 C.F.R. § 12.130 (1985). The Commissioner explained this regulation was designed "to prevent circumvention or frustration of visa or export license requirements contained in multilateral and bilateral agreements to which the U.S. is a party in order to facilitate the efficient and equitable administration of the U.S. Textile Import Program." 50 Fed. Reg. 8710-8711. The Commissioner also discussed the Final Regulations in light of the comments received on the Interim Regulations.

The regulation states in pertinent part:

(b) *Country of origin.* For the purpose of this section and except as provided in paragraph (c), a textile or textile product, subject to section 204, Agricultural Act of 1956, as amended, imported into the customs territory of the United States, shall be a product of a particular foreign territory or country, or insular possession of the U.S., if it is wholly the growth, product, or manufacture of that foreign territory or country, or insular possession. However, except as provided in paragraph (c), a textile or textile product, subject to § 204, which consists of materials produced or derived from, or processed in, more than one foreign territory or country, or insular possession of the U.S., shall be a product of that foreign territory or country, or insular possession where it last underwent a substantial transformation. A textile or textile product will be considered to have

undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

\* \* \* \* \*

(d) *Criteria for determining country of origin.* The criteria in paragraphs (d)(1) and (2) of this section shall be considered in determining the country of origin of imported merchandise. These criteria are not exhaustive. One or any combination of criteria may be determinative, and additional factors may be considered.

(1) A new and different article of commerce will usually result from a manufacturing or processing operation if there is a change in:

- (i) Commercial designation or identity,
- (ii) Fundamental character or
- (iii) Commercial use.

(2) In determining whether merchandise has been subjected to substantial manufacturing or processing operations, the following will be considered:

(i) The physical change in the material or article as a result of the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.

(ii) The time involved in the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.

(iii) The complexity of the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.

(iv) The level or degree of skill and/or technology required in the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.

(v) The value added to the article or material in each foreign territory or country, or insular possession of the U.S., compared to its value when imported into the U.S.

(e) *Manufacturing or processing operations.* (1) An article or material usually will be a product of a particular foreign territory or country, or insular possession of the U.S., when it has undergone prior to importation into the U.S. in that foreign territory or country, or insular possession any of the following:

(i) Dyeing of fabric and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing;

(ii) Spinning fibers into yarn;

(iii) Weaving, knitting or otherwise forming fabric;

(iv) Cutting of fabric into parts and the assembly of those parts into the completed article; or

(v) Substantial assembly by sewing and/or tailoring of all cut pieces of apparel articles which have been cut from

fabric in another foreign territory or country, or insular possession, into a country, or insular possession, into a completed garment (e.g. the complete assembly and tailoring of all cut piece [sic] of suit-type jackets, suits, and shirts).

(2) An article or material usually will not be considered to be a product of a particular foreign territory or country, or insular possession of the U.S. by virtue of merely having undergone any of the following:

(i) Simple combining operations, labeling, pressing, cleaning or dry cleaning, or packaging operations, or any combination thereof;

(ii) Cutting to length or width and hemming or overlocking fabrics which are readily identifiable as being intended for a particular commercial use;

(iii) Trimming and/or joining together by sewing, looping, linking, or other means of attaching otherwise completed knit-to-shape component parts produced in a single country, even when accompanied by other processes (e.g. washing, drying, mending, etc.) normally incident to the assembly process;

(iv) One or more finishing operations on yarns, fabrics, or other textile articles, such as showerproofing, superwashing, bleaching, decating, fulling, shrinking, mercerizing, or similar operations; or

(v) Dyeing and/or printing of fabrics or yarns.

19 C.F.R. § 12.130(b), (d), (e) (1986). In light of this regulation we turn to the following facts which have been established by depositions and testimony presented at trial.

The plaintiff, Mast, on or about July 23, 1986, attempted to enter a shipment of fabric into the JFK Airport area of New York. The shipment was excluded from entry by Customs. The merchandise was manufactured in its unfinished form in the P.R.C., was imported to Hong Kong, underwent some processing, and continued on its journey to the United States where it was denied entry because it lacked the proper required entry visa from the country of origin of the goods. Mast presented an entry visa from Hong Kong believing Hong Kong was the country of origin, but Customs determined the country of origin for the goods was the P.R.C. Mast was unable to get a P.R.C. visa for the fabric. A more thorough discussion of the manufacturing and processing operations performed on the merchandise in both countries is necessary before examining the country of origin decision by Customs.

The fabric in question was produced in the P.R.C. from cotton that is planted, grown, picked, and then processed through a cotton gin. The gin cleans the cotton by removing the seeds and other, but not all, foreign matter. The cotton is then baled and sent to a fabric mill where the cotton is repeatedly cleaned and brushed by various machines in order to produce a parallelization of the cotton fibers.

There are a series of cleaning machines employed in the preparation of the fiber as well as a lap machine which changes the fiber into a pulpy substance and a carding machine which begins the process of parallelization of the fibers. The fibers must be subjected to separating, cleaning, and parallelization processes before the fibers can be inserted into more machines which reduce the diameter of the fibers, and twist and strengthen them. The fibers are then wound onto a bobbin and loaded onto a spinning frame where the fibers are spun into yarn.

After the yarn is wound, it is separated into two categories to be designated as warp yarn or weft yarn. Warp yarn is the vertical yarn of a fabric; weft yarn is the horizontal. Once designated, the yarn is then placed on a loom to weave the yarn into fabric. Depending upon the different mechanisms of a loom, the warp and weft yarn can be woven under and across each other in different intervals to produce typically a 3 by 1 twill or a 2 by 1 twill. When the yarn has been woven into fabric, the fabric is removed from the loom, cut, and rolled accordingly.

The unfinished fabric is usually referred to in the textile industry as "greige" goods or "greige" fabric. This is the basic, crude, unfinished fabric which will usually require a certain amount of processing to convert the fabric into a usable "ready for the needle" product.<sup>1</sup>

#### DISCUSSION

The issue before this Court is apparently one of first impression and concerns the "country of origin" of certain merchandise Mast has tried to enter into the United States. The country of origin is determined by establishing in which country the goods last underwent a substantial transformation. This, in turn, is established by considering whether or not the goods were transformed by means of substantial manufacturing or processing operations into a new and different article of commerce. There is no prior case law which con-

<sup>1</sup> Testimony, from both parties' witnesses, established the preprocessed rough material has a limited use in which it may be sewn and slightly processed to make work gloves or not processed at all to produce painters' dropcloths and painters' pants. A number of the processes to which the "greige" fabric is subjected are as follows:

1. Singeing is accomplished by passing the goods at a relatively high speed over lighted gas jets. This process removes extraneous fibers or "hairs" from the surface of the greige fabric and thereby results in a smoother appearance. It also promotes a more uniform application of color during the dyeing process.
2. Desizing is where the goods are subjected to an enzyme bath which digests the sizing starches and permits their removal from the greige fabric. The goods are then washed to rinse away the digested starch materials.
3. With scouring, the material is subjected to a hot caustic soda solution to remove many of the impurities still remaining in the material.
4. Bleaching is accomplished through application of a peroxide or chlorine solution which removes additional foreign matter still present in the material and whitens the fabric.
5. Mercerizing uses a cool caustic soda solution which is applied to the fabric while under tension. This causes a swelling of the cotton fibers which improves the dyeability of the fabric, produces rich colors, and gives the fabric surface increased sheen or luster.
6. Dyeing is the process whereby the fabric is subjected to dyestuff solutions.
7. Softening occurs when a chemical substance is applied to the fabric to make it soft to the touch, or "hand." It can be done by the same machinery which does the width adjustment, or tentering.
8. Tentering is the process which adjusts the width of the fabric through the use of pins or clips on a conveyor system in the presence of steam or heat. This process is also referred to as "stentering," which is the British term for this process.
9. Pre-shrinking is sometimes referred to as sanforizing and is a mechanical shrink control process. Pre-shrinking will minimize shrinkage of the fabric after it is sewn into a garment and laundered.
10. Finally, the finished product is inspected, measured, and packed prior to its shipment to the garment manufacturer.

It should be noted after each wet process, i.e., desizing, scouring, bleaching, mercerizing, dyeing and softening, the material must be dried. This drying is accomplished by running the material over a series of steam heated rollers.

trols this area of law. All parties agree 19 C.F.R. § 12.130 entitled "Textiles and textile products country of origin" controls the matter at hand. The Customs Service recently promulgated this regulation to provide a clear set of criteria for determining the country of origin of imported textile products for quota purposes.

Concerning the issue at hand, the regulation states a textile product, processed in more than one country, is the product of the country where it last underwent a substantial transformation. The regulation sets forth, in pertinent part, what constitutes a substantial transformation:

A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed by means of *substantial manufacturing or processing operations into a new and different article of commerce.*

19 C.F.R. § 12.130(b) (emphasis added).

For a substantial transformation to have occurred, the regulation explains, the textile product must have been "transformed by means of substantial manufacturing or processing operations into a new and different article of commerce." 19 C.F.R. § 12.130(b). What becomes the difficult task is determining what constitutes "substantial manufacturing or processing operations" and what constitutes "a new and different article." The regulation although previously quoted, lends some clarity and bears repeating here in part:

(d) *Criteria for determining country of origin.* The criteria in paragraphs (d)(1) and (2) of this section shall be considered in determining the country of origin of imported merchandise. These criteria may be determinative, and additional factors may be considered.

(1) A new and different article of commerce will usually result from a manufacturing or processing operation if there is a change in:

- (i) Commercial designation or identity,
- (ii) Fundamental character or
- (iii) Commercial use.

\* \* \* \* \*

(e) *Manufacturing or processing operations.* (1) An article or material *usually will be* a product of a particular foreign territory or country, or insular possession of the U.S., when it has undergone prior to importation into the U.S. in that foreign territory or country, or insular possession any of the following:

(i) *Dyeing of fabric and printing when accompanied by two or more of the following finishing operations:* bleaching, shrinking, fulling, napping, decatizing, permanent stiffening, weighting, permanent embossing, or moireing;

\* \* \* \* \*

(2) An article or material *usually will not be* considered to be a product of a particular foreign territory or country, or insular

possession of the U.S. by virtue of *merely having undergone any of the following:*

\* \* \* \* \*

(iv) *One or more finishing operations on yarns, fabrics, or other textile articles, such as showerproofing, superwashing, bleaching, decating, fulling, shrinking, mercerizing, or similar operations; or*

(v) *Dyeing and/or printing of fabrics or yarns.*

19 C.F.R. § 12.130 (emphasis added).

Testimony was presented by both parties concerning the three criteria to consider under subsection (d)(1). Mast presented expert testimony which supported the proposition the merchandise in question changed in its commercial designation or identity from "greige" goods to "finished" fabric due to the processes performed on the merchandise in Hong Kong. Customs, in direct opposition, presented expert testimony which established "greige" fabric is commonly referred to in the trade as "fabric," the same title applied to "finished" fabric.

Mast also strenuously argued after the fabric was subjected to extensive processing, the "greige" goods were transformed into a substantially new product "ready for the needle." It offered proof at the trial indicating there were dealers in "greige" goods markets and other dealers who dealt in distinctively different markets with finished fabric. Furthermore, Mast offered evidence indicating there was often a significant change in the value of the goods after the processing took place. This augmentative value could apparently be as much as 20-30%.

Customs, on the other hand, argued just the reverse was true. It presented testimony the fabric's fundamental character had not changed from the processes in Hong Kong. The fabric was substantially, if not totally, complete at the time it was manufactured in China. Evidence was presented both finished and greige fabric are usable in the manufacture of garments. Customs contended fabric was essentially complete in its greige form for some garment applications and, at the least, was merely unfinished fabric for other garment applications requiring a modification of aesthetics. Mast's witnesses also concurred "greige" goods could be sold to a limited commercial market.

Both parties presented additional testimony supporting their contentions the facts applied to the criteria listed under subsection (d)(2) weighed more in their respective favor concerning a substantial manufacturing or processing operation than in the opposing side's favor.

The difficulty with all these arguments, as persuasive as they may be, is they fail to address the issue of whether or not Customs, through its regulations, has precluded certain marginal processes from being considered as sufficient to establish a substantial trans-

formation has occurred. The regulation seems clear, under subsection (e), that in dealing with fabrics, finishing operations involving less than a combination of dyeing and printing together with at least two other major finishing operations will not usually result in a substantial transformation of the fabric.

The comments of the Customs Service in the Federal Register, prior to the promulgation of this regulation, underlines this legitimate concern of the agency:

Customs believes it is appropriate to amplify on the dyeing or printing example in the interim regulations to provide better guidance on the type or types of operations that will result in a change in the country of origin. Three examples concerning finishing operations have been inserted in the final regulations which are more specific and convey Customs views that, in the case of fabrics, usually any finishing operations short of a combination of both dyeing and printing together with at least two other major finishing operations will not result in a substantial transformation of the fabric.

To satisfy the objections of some commenters that certain marginal processing should not result in a substantial transformation, Customs has added language in § 12.130(e)(2) in the final rule indicating that dyeing or printing, or dyeing and printing of fabrics and yarns, or one or more finishing operations on yarns, fabrics, or garments, such as showerproofing, superwashing, bleaching, decatizing, fulling, shrinking, mercerizing, or similar operations, will not usually result in a substantial transformation.

50 Fed. Reg. at 8713 (emphasis added).

While it is not the purpose of this determination to delve into the administrative reasons for all of these regulations, it is not difficult to surmise Customs, in the administration of its obligations, deems desirable the avoidance of deciding on a case by case basis if various marginal operations result in a substantial transformation. It does not take much imagination to envision circumstances where one importer could argue bleaching, decatizing, and fulling result in substantial transformation and in another case argue only bleaching and decatizing are sufficient. An administrative nightmare could result.

The evidence produced at trial established the existence of many of the so-called marginal processes performed on the fabric which is the subject of this case. It was, nevertheless, also established at the trial none of the fabric was subjected to dyeing and printing and accompanied by two or more finishing operations such as bleaching, shrinking, fulling, napping, decatizing, permanent stiffening, weighting, permanent embossing, or moireing.

When the construction of an administrative regulation is at issue, deference shall be given to the regulation's interpretation made by the officers or agency charged with its administration. The administrative interpretation of an administrative regulation becomes the

controlling factor unless it is plainly erroneous or inconsistent with the regulation. *Udall v. Tallman* 380 U.S. 1, 16-17 (1965); *see also United States v. Larionoff* 431 U.S. 864 (1977); *Melamine Chemicals, Inc. v. United States*, 732 F.2d 924 (Fed. Cir. 1984).

Accordingly, this Court determines, from the above analysis, it was not erroneous or inconsistent with 19 C.F.R. § 12.130, and certainly not unreasonable for Customs to have concluded the country of origin of the goods Mast was trying to enter, was the P.R.C. Therefore, it was proper for Customs, pursuant to the regulations, to require Mast to submit the proper documentation, including an entry visa from the P.R.C. As stated before, this Court must give deference to Customs' interpretation of its own administrative regulation, provided its decisions are not erroneous or inconsistent with that regulation.

#### CONCLUSION

For the reasons stated, the complaint of plaintiff is dismissed, and the determination of Customs denying entry of the finished fabric by plaintiff under the Hong Kong visa is sustained.

Judgment will be entered accordingly.

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(Slip Op. 87-9)

GILMORE STEEL CORP., OREGON STEEL MILLS DIVISION, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND POHANG IRON AND STEEL LTD., INTERVENOR

Court No. 86-05-00606

Before TSOUALAS, *Judge*

[Intervenor's motion to dismiss denied.]

(Decided January 16, 1987)

*Heller, Ehrman, White & McAuliffe* (Rene P. Tatro and Eric J. Sinrod) for the plaintiff.

*Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director, Department of Justice, Commercial Litigation Branch, Civil Division (*J. Kevin Horgan*) for the defendant.

*Mudge Rose Guthrie Alexander & Ferdon* (*Donald B. Cameron, Jr.* and *Alan H. Price*) for the intervenor.

#### OPINION

TSOUALAS, *Judge*: This action is before the Court on the motion of intervenor, Pohang Iron & Steel Co. (POSCO), to dismiss for lack of jurisdiction due to insufficient service of process and for lack of standing on the part of plaintiff, Gilmore Steel Corporation (Gilmore). The defendant, United States, joins Gilmore in opposing the motion.

## BACKGROUND

Plaintiff commenced this action on May 14, 1986 to contest revocation of an antidumping order on carbon steel plate from Korea. It filed a summons with the clerk of the court within 30 days of publication of notice of the revocation, and within 30 days thereafter, on June 12, 1986 filed a complaint with the clerk and served same upon defendant. See 19 U.S.C. § 1516a(a)(2)(A) (1982 & Supp. III 1985); USCIT R. 4(a).

At the time it first filed the summons with the clerk, plaintiff, in accordance with USCIT R. 3(e), notified every interested party of commencement of the action, except POSCO. Gilmore's counsel inadvertently used the service list pertaining to another action, Court No. 86-5-00607, involving carbon steel plate from Japan, which did not include POSCO as an interested party. On Oct. 7, 1986, POSCO filed a motion to intervene and an answer to plaintiff's complaint raising its jurisdictional objection. Gilmore served a copy of the summons and complaint on POSCO on Oct. 24, 1986. The Court granted the motion to intervene on Oct. 29, 1986 and POSCO's motion to dismiss was deemed filed as of that date.

POSCO makes three claims for the purposes of the motion to dismiss. First, USCIT R. 3(e) has been violated since plaintiff failed to notify an interested party at the time the action was commenced or "promptly thereafter." Secondly, compliance with Rule 3(e) is a jurisdictional prerequisite to the commencement of an action in this Court, and therefore, failure to strictly observe Rule 3(e) must result in dismissal of the action. Thirdly, plaintiff lacks standing to commence suit since it has failed to observe the requirements of 19 U.S.C. § 1516a(d) (1982).

## PERTINENT STATUTES &amp; RULES OF COURT

28 U.S.C. § 2632(c) (1982)<sup>1</sup> governs the commencement of the action in the instant case:

**§ 2632. Commencement of a civil action.**

(c) A civil action in the Court of International Trade under section 516A of the Tariff Act of 1930 shall be commenced by filing with the clerk of the court a summons or a summons and a complaint, as prescribed in such section, with the content and in the form, manner, and style prescribed by the rules of the court.

**§ 1516a. Judicial review in countervailing duty and anti-dumping duty proceedings**

\* \* \* \* \*

**(2) Review of determinations on record**

(A) In general.—Within thirty days after—

<sup>1</sup> 28 U.S.C. § 2632(c) (1982 & Supp. III 1985) expressly incorporates the time limits to commence an action provided in 19 U.S.C. § 1516a:

(c) A civil action contesting a reviewable determination listed in section 516A of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within the time specified in such section.

(i) the date of publication in the Federal Register of—  
[notice of the contested determination]

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

#### § 1516a(d). Standing

Any interested party who was a party to the proceeding under section 1303 of this title or subtitle IV of this chapter shall have the right to appear and be heard as a party in interest before the United States Court of International Trade. The party filing the action shall notify all such interested parties of the filing of an action under this section, in the form, manner, style, and within the time prescribed by rules of the court.

#### USCIT R. 3(e):

##### (e) NOTICE TO INTERESTED PARTIES

In an action described in 28 U.S.C. § 1581(c), the plaintiff, as provided in section 516A(d) of the Tariff Act of 1930, shall notify every interested party who was a party to the administrative proceeding of the commencement of the action, by mailing a copy of the summons at the time the action is commenced, or promptly thereafter, by certified or registered mail, return receipt requested, to each such party at the address last known in the administrative proceeding.

### DISCUSSION OF LAW

#### A. Jurisdiction

The Court of Appeals for the Federal Circuit has described the requirements for commencing an action pursuant to 19 U.S.C. § 1516a(a)(2)(A) as plain and unambiguous. *NEC Corp. v. United States*, 9 CIT 557, 622 F. Supp. 1086 (1985), *reh'g denied*, 10 CIT —, 628 F. Supp. 976 (1986), *aff'd*, Appeal Nos. 86-912/86-922 at 3 (Fed. Cir. Nov. 28, 1986).

It imposes two requirements for "commenc[ing] an action" in the Court of International Trade \* \* \* (1) within 30 days of the publication of the determination in the Federal Register, a summons must be filed, and (2) "within thirty days thereafter a complaint" must be filed. The statute requires both steps and imposes precise time limits within which each step must be taken.

*Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1311 (Fed. Cir. 1986).

When the aforementioned requirements are properly complied with, an action has been commenced. Against this background, in-

tervenor attempts to rely on *Georgetown Steel* and *NEC* for the proposition that USCIT R. 3(e) is jurisdictional in nature.

In *NEC*, the Court of Appeals affirmed the trial court's dismissal of an action where the plaintiff had failed to affix the proper postage to the summons it had attempted to file with the clerk of the court. Therefore, plaintiff could not avail itself of "date-of-mailing" filing provided for in USCIT R. 5(g). The summons was not mailed with proper postage affixed until after the statutory period for filing a summons had terminated. The court dismissed the action since it could not enlarge that 30 day period. *NEC*, 9 CIT at —, 622 F. Supp. at 1089. In *Georgetown Steel*, the Federal Circuit held that the CIT lacked jurisdiction where plaintiff failed to properly file a complaint within 30 days after the summons was filed. The initial attempt to employ "date-of-mailing" filing failed because the complaint was mailed with insufficient postage. The complaint was first placed in the mail with sufficient postage 43 days after filing of the summons. Since the appellate court determined that the 30 day period for filing a complaint was jurisdictional, it held that the trial court lacked discretion to allow a late filing. *Georgetown Steel*, 801 F.2d at 1312.

It must be remembered that the focus of *Georgetown Steel* and *NEC* was on the filing requirements to commence an action against the United States as defendant rather than on notice requirements for interested third parties. In *NEC*, the Federal Circuit stressed the necessity for a summons initiating an action against the United States to be filed in the manner required by § 1516a(a) and USCIT R. 5(g). In so doing, the court reaffirmed its dedication to the venerable doctrine of sovereign immunity:

The terms of the government's consent to be sued in any particular court define that court's jurisdiction to entertain the suit. *United States v. Testan*, 424 U.S. 392, 399 (1976), quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Conditions upon which the government consents to be sued must be strictly observed and are not subject to implied exceptions. *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981), citing *Soriano v. United States*, 352 U.S. 270, 276 (1957).

*NEC Corp. v. United States*, Appeal Nos. 86-912/86-922 at 4. See also *Georgetown Steel*, 801 F.2d at 1312 (30 day period for filing complaint strictly enforced as part of waiver of sovereign immunity in § 1516a(a)(2)(A)).

In the case at bar, it is unquestioned by any party that the filing of the summons and complaint vis-a-vis the United States was proper. Nonetheless, intervenor would allow any interested party who was a party to the administrative proceeding to stand, in effect, in the place of the United States, and assert the latter's sovereign immunity in order to dismiss the action for alleged non-compliance with USCIT R. 3(e).

Whatever the merits of that position, the Court notes that the provision at issue in the instant case is unlike either the one in *Georgetown Steel* or *NEC*.<sup>2</sup> The 30 day filing period for a complaint and the requirement in USCIT R. 5(g) that proper postage be affixed to utilize "date-of-mailing" filing were both unmistakably clear. In contrast, USCIT 3(e) was drafted with the ambiguous word "prompt," instead of a definite time period within which to effect notice on interested parties. It remains to be determined, therefore, what is meant by that term.

#### B. Rule 3(e).

Initially, the Court notes that intervenor has not alleged any actual prejudice resulting from the delay in notice. Its argument rests on its construction of the applicable statutes and on the policy rationale that interested parties must be protected from "discovering about a case from 'word on the street.'" *Intervenor's Motion to Dismiss* at 8. Furthermore, POSCO does not directly challenge plaintiff's explanation for the error in service, although it asserts that no "good cause for delay [in service] is shown," *id.*, and claims that while other interested parties were notified, Gilmore failed to serve the only foreign producer involved in the case. *Id.* at 9.<sup>3</sup>

The parties have not alerted the Court to any established construction of the term "prompt." Plaintiff suggests that since "no precise time designation is given by a statute or a court rule to complete such an act, there is 'no fixed time limit.'" *Plaintiff's Opposition to Motion to Dismiss* at 8 citing *SSIH Equip. S.A. v. United States Int'l Trade Comm'n*, 69 CCPA 140, 145, 673 F.2d 1387, 1391 (1982). POSCO urges that the Court adopt the 120 day period specified in Fed. R. Civ. P. 4(j) and USCIT R. 4(h)<sup>4</sup> to establish the meaning of prompt in USCIT R. 3(e).

Even if these provisions were applicable to the instant situation,<sup>5</sup> they, by their express terms, do not set 120 days as an arbitrary cut-

<sup>2</sup> Similarly, Rule 3(e) differs from Rule 3(b). The latter rule mandates payment of a filing fee "when an action is commenced," and unlike Rule 3(e), makes no provision for compliance "promptly" after commencement of the action. In any event, intervenor's reliance on the decision in *Former Employees of Badger Coal Co. v. United States*, 10 CIT —, Slip. Op. 86-113 (Nov. 3, 1986), as dispositive of the jurisdictional issue in the instant case is misplaced. *Intervenor's Reply to Opposition to Motion to Dismiss* at 3-4. In *Badger Coal*, plaintiff failed in any way to respond to a motion to dismiss for failure to pay the filing fee. *Badger Coal*, Slip. Op. 86-113 at 2. This Court expressly declined to decide whether, under any circumstances, late payment of the fee might be permitted. *Id.* at 3 n.1.

<sup>3</sup> In reply papers, intervenor alleges that Lukens, Inc., described as an interested party to the proceeding, has never been notified of the action. *Intervenor's Reply to Opposition to Motion to Dismiss* at 9. Plaintiff asserts that Lukens' involvement in proceedings before the International Trade Administration consisted essentially of informing that agency by letter, that it, along with a majority of the domestic industry, was no longer concerned with antidumping duties. *Supplemental Declaration of Eric J. Sinrod in Opposition to Motion to Dismiss* at 2. Whatever Lukens' degree of involvement, the Court believes that POSCO may not properly assert an objection to the lack of notice given to another party.

<sup>4</sup> Under the Federal Rules of Civil Procedure, an action is commenced by filing a complaint with the court. Fed. R. Civ. P. 3. Fed. R. Civ. P. 4(e) then requires "prompt" service of the summons and complaint by plaintiff's attorney. Fed. R. Civ. P. 4(j), which is materially identical to USCIT R. 4(h), explains:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice.

<sup>5</sup> As intervenor admits, these provisions do not expressly govern the instant action. It insists, however, that the Court may be guided by the definition of prompt service that they provide. In particular, intervenor views cases interpreting the good cause standard of Fed. R. Civ. P. 4(j) as persuasive. In some circumstances, a court may use the Federal Rules of Civil Procedure as a guide to construe the USCIT Rules. See *Sumitomo Metal Indus. v. Bobcock & Wilcox Co.*, 68 CCPA 75, 78 n.3, 669 F.2d 703, 705 n.3 (1982) (where language of USCIT R. 24(a) and Fed. R. Civ. P. 24(a) identical, court properly looks to interpretations of the latter as an aid to construing the former). See also USCIT R. 1 ("The court may refer for guidance to the rules of other courts."). It is less clear whether it follows from this that a court should look to differently worded provisions, i.e. USCIT R. 4(h) or Fed. R. Civ. P. 4(j), to interpret USCIT R. 3(e).

off point. A court must consider whether there is "good cause" shown for the delay before deciding whether to dismiss the action.

Notwithstanding certain decisions of other courts, *see, e.g., Wei v. State of Hawaii*, 763 F.2d 370, 371 (9th Cir. 1985) (per curiam) (dismissal of action not an abuse of discretion where plaintiff's counsel failed to docket applicable 120 day limit), there is authority from the Court of International Trade holding that under certain circumstances, counsel's inadvertence may qualify as good cause. In *Jernberg Forgings Co. v. United States*, 7 CIT 62, *vacated on other grounds*, 8 CIT 245 (1984), the court granted leave to a party to file its complaint out of time on the basis that its initial failure to mail the complaint with sufficient postage constituted good cause. *See also Pistachio Group of the Ass'n of Food Indus. v. United States*, 10 CIT —, 642 F. Supp. 1176, 1179 (1986) (good cause shown where complaint filed two days late due to incorrect docketing).<sup>6</sup>

The delay in notice in the instant case was considerably longer than the delay in service in *Jernberg* or *Pistachio Group*. At the same time, the Court cannot discern a truly compelling distinction between the failed attempts to mail the complaint in those cases and the failure to mail the summons in this case.<sup>7</sup> The touchstone of the inquiry should be actual prejudice attributable to the delay in notification. *See Pistachio Group*, 642 F. Supp. at 1179. *See also Sumitomo Metal Indus.*, 69 CCPA at 83, 669 F.2d at 708-09 (in assessing "timeliness" of motion to intervene under Rule 24(a)(1), prejudice to the parties is perhaps the central consideration). In the instant case, there has been no prejudice due to the delay in notification, and all parties are up to date in the litigation. Plaintiff's counsel has apparently acted in good faith and rectified its error upon learning of it. Notification was as prompt as reasonable possible in this action. Even adopting intervenor's proposed definition,<sup>8</sup> the Court finds the notification prompt since there was good cause for any delay in notice beyond 120 days after commencement of the action.

#### CONCLUSION

The Court holds that notification was given in the instant case in a reasonably prompt fashion. While careless practice is not to be encouraged, the Court concludes that, under the facts of this case, and

<sup>6</sup> The *Jernberg* and *Pistachio* courts determined that the respective plaintiffs in those cases had failed to meet the 30 day deadline for filing a complaint contained in 19 U.S.C. § 1516a(a)(2)(A). Because this requirement was held not to be jurisdictional, these courts reasoned that the late filings could be excused, pursuant to USCIT R. 6(b), if good cause for the delay could be demonstrated. Subsequent to these decisions, the Federal Circuit, in *Georgetown Steel*, 801 F.2d at 1312, has held that a timely filed complaint is a jurisdictional prerequisite under § 1516a(a)(2)(A). Despite this, the Court believes that the above cited cases continue to provide useful guidance as to what conduct satisfies the good cause standard.

<sup>7</sup> Plaintiff attempted notification of the interested parties on the day it filed the summons, but was frustrated with respect to POSCO by the error of its counsel in using the service list pertaining to another action. Arguably, this effort, like that in *Jernberg*, represents a somewhat more diligent effort to comply with the Rules than that exhibited in *Pistachio Group* where plaintiff failed to appropriately docket the applicable deadline. *See Pistachio Group*, 642 F. Supp. at 1179. In any event, there is little danger, under the facts of this case, of the good cause exception swallowing the rule. *Wei*, 763 F.2d at 372, since, unlike *Wei*, this is not an instance where plaintiff failed to even docket the relevant time limitation.

<sup>8</sup> Intervenor initially proposed that "the plain meaning" of Rule 3(e) permits only the smallest delay. Perhaps, one or two weeks might be arguable. *Intervenor's Motion to Dismiss* at 7. Then intervenor ostensibly abandoned reliance on the plain meaning of Rule 3(e) in favor of the 120 day standard borrowed from USCIT R. 4(h) and Fed. R. Civ. P. 4(i). *Id.* at 8; *Intervenor's Reply to Opposition to Motion to Dismiss* at 5-6. Intervenor's inconsistent efforts to define prompt in terms of a specific number of days are illustrative of the futility of such an approach.

in the absence of actual prejudice to intervenor, dismissal of the action is not warranted as a penalty for counsel's inadvertence. Finally, the Court notes that, even adopting intervenor's definition of the term, notification was "promptly" given, since there was good cause for giving notice more than 120 days after commencement of the action. Accordingly, intervenor's motion to dismiss is denied.

(Slip Op. 87-10)

INTERREDEC, INC., AND INTERREDEC SULFUR CORP., PLAINTIFFS v. UNITED STATES, MALCOLM T. BALDRIDGE, SECRETARY OF COMMERCE, THE INTERNATIONAL TRADE ADMINISTRATION OF THE U.S. DEPARTMENT OF COMMERCE, WILLIAM VON RAAB, COMMISSIONER OF THE U.S. CUSTOMS SERVICE, AND THE CUSTOMS SERVICE OF THE U.S. DEPARTMENT OF TREASURY, DEFENDANTS

Court No. 86-11-01423

Before TSOUALAS, Judge.

[Plaintiffs' motion for preliminary injunction granted; defendants' motion to dismiss denied.]

(Decided January 20, 1987)

*Cameron, Hornbostel & Butterman (Larry W. Thomas)* for the plaintiffs.

*Richard K. Willard*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrensis*) for the defendants.

#### MEMORANDUM OPINION AND ORDER

TSOUALAS, Judge: Plaintiffs have initiated this action challenging the refusal by the International Trade Administration of the Department of Commerce (ITA) to conduct a § 751 annual review of plaintiffs' imports for the period December 1984 through November 1985.<sup>1</sup> Concurrent with commencement of this action, plaintiffs have moved for injunctive relief,<sup>2</sup> seeking to prevent the Customs Service from liquidating their entries and collecting \$559,594.25 in cash deposits paid by plaintiffs as estimated antidumping duties. Plaintiffs request either refund of these estimated duties or, the opportunity to have the ITA conduct a review of their imports for the above mentioned period. Defendants have moved to dismiss the action for failure to state a claim for which relief can be granted.

<sup>1</sup> Plaintiffs have initiated this action pursuant to 28 U.S.C. § 1581(i). The court may properly entertain an action under this section when the challenged ITA decision was made during a proceeding that would not culminate in a final determination enumerated in 19 U.S.C. § 1516a and contestable via 28 U.S.C. § 1581(c). *Royal Business Machines, Inc. v. United States*, 69 CCPA 61, 73-74, 669 F.2d 692, 701-702 (1981); *Ceramica Regiomontana, S.A. v. United States*, 5 CIT 23, 557 F. Supp. 596 (1983). In this situation the decision is to exclude plaintiffs from the 12/1/84-11/30/85 review, in which event plaintiffs will be denied access to contest the duty rate for this period. In such circumstances the residual jurisdiction granted to this court may be invoked. See *British Steel Corp., et. al. v. United States*, 10 CIT —, Slip. Op. 86-104 at 8 (October 17, 1986) ("the court agrees with defendants and intervenor [emphasis added] that in order to contest Commerce's refusal to conduct a § 751 review, plaintiffs must commence a new action pursuant to 28 U.S.C. 1581(i)."), appeal docketed, No. 87-1050 (Fed. Cir. Nov. 3, 1986).

<sup>2</sup> The direction to liquidate plaintiffs' entries was issued on November 14, 1986. On November 17, 1986, this Court granted plaintiffs' request for a temporary restraining order pending the opportunity for oral arguments, which were heard on November 24, 1986.

## BACKGROUND

Plaintiffs are foreign exporter and United States importer of Canadian elemental sulfur and their imports are subject to an outstanding antidumping finding. T.D. 74-1, 38 Fed. Reg. 34655 (December 17, 1973). Plaintiffs began selling this product in the United States in December 1982 and were classified as a new importer. Therefore, plaintiffs were required to deposit at the time of entry, estimated antidumping duties at the rate of 28%.<sup>3</sup> This rate is effective until an annual review is conducted of plaintiffs' entries to determine the margin, specifically by which, plaintiffs are dumping. That margin is then used as the rate at which antidumping duties are imposed on plaintiffs' entries. If the amount plaintiffs paid in estimated antidumping duties is greater than the actual rate assessed, plaintiffs are entitled to a refund. 19 C.F.R. § 353.50.

Commerce conducted its first annual review of plaintiffs' imports for the period December 1981-December 1982 (the period was extended from November 1982 until December 1982 for plaintiffs because that was the month in which they began importing). On August 15, 1984, the ITA published preliminary results of this review indicating that plaintiffs had zero dumping margins. 49 Fed. Reg. 32632 (August 15, 1984). On September 18, 1985, the ITA published the final results of this review, concluding that plaintiffs had zero dumping margins, and effective that date, eliminated the deposit requirement. 50 Fed. Reg. 37889.

In the interim, on October 30, 1984, automatic review procedures were amended, whereby annual reviews would only be conducted upon request. On August 13, 1985, the ITA published final and interim-final rules to implement this amendment. 50 Fed. Reg. 32556. On August 30, 1985, the ITA issued notice to all interested parties advising them of the new regulations and informing them that if no timely request was received the entries subject to the antidumping duty order would be liquidated according to the rate of estimated duties on deposit. 19 C.F.R. § 353.53a(d).

On October 23, 1985, a request was filed by a petitioner for an administrative review of plaintiffs' exports for the period 12/182-11/30/84. Further, interested parties in the Canadian elemental sulfur proceeding were then given notice of their opportunity to request a review for the period 12/1/84-11/30/85. 50 Fed. Reg. 49739 (December 4, 1985). No request was submitted. Apparently plaintiffs relied on the advice of two case analysts, Jeri Larsen and Joseph Fargo, who were consulted independently. They told plaintiffs not to initiate a review for periods after December 1982, because the zero deposit rate would be effective for all sales by plaintiffs made after that date and plaintiffs would automatically be refunded deposits paid unless a review was requested. Plaintiffs again spoke with Mr. Fargo who stated that they would receive a refund of cash deposits

<sup>3</sup> For any new importer not covered by the most recent administrative review, a cash deposit was required at the highest dumping margin rate calculated for that review period. 47 Fed. Reg. 14507, 14510 (April 5, 1982).

for the period 12/1/84-9/18/85 (since a review was requested from 12/1/82-11/30/84, plaintiffs were not entitled to an automatic refund but had to await the results of that review). In October 1986, Mr. Fargo allegedly stated that he would draft instructions to Customs to liquidate plaintiffs' entries for 12/1/84-9/18/85 at a zero deposit rate so that in effect plaintiffs would receive a refund for this period. However, ITA officials disagreed with this advice and took the position that since plaintiffs had failed to file a timely request for review, the entries would be liquidated at the rate on deposit. Plaintiffs met with ITA officials unsuccessfully and on October 17, 1986 filed a request for review for the period 12/1/84-11/30/85. On November 14, 1986 the ITA issued an order to liquidate the entries at the 28% rate on deposit. Plaintiffs now claim they are entitled to a refund of this money, or alternatively, an administrative review of their 1984-1985 entries should be conducted to determine whether a refund is warranted.

#### DISCUSSION

In order for plaintiffs to prevail on their motion for a preliminary injunction, they must clearly demonstrate the following: (1) the threat of immediate and irreparable harm; (2) the likelihood of success on the merits; (3) that the public interest would be better served by issuing rather than by denying the injunction; and (4) that the balance of hardships to the parties favors the issuance of an injunction. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983); *S.J. Stile Associates, Ltd. v. Snyder*, 68 CCPA 27, 30, 646 F.2d 522, 525 (1981). It is clear that the liquidation of entries would constitute irreparable harm where the entries are subject to an antidumping duty order which is being challenged. *Zenith Radio Corp.*, 710 F.2d at 810. Absent the injunction, judicial review would be meaningless since the entries would be liquidated at the challenged rate and plaintiffs would not be able to recoup this amount if the rate was ultimately determined to be incorrect. *Id.* at 810. The amount of duty potentially at risk here is \$559,594.25, which plaintiffs claim represent approximately 60% of their projected 1986 net income. It seems under these circumstances plaintiffs have met their burden of demonstrating irreparable harm.

As to success on the merits of the action, plaintiffs' main contention is that the ITA had an obligation to conduct an annual review of plaintiffs' entries for the 1984-1985 period regardless of whether a request was filed.

The annual review procedures were established by the Trade Agreements Act of 1979, which added Title VII to the Tariff Act of 1930 including a new § 751, providing in pertinent part:

At least once during each 12-month period beginning on the anniversary of the date of publication of \* \* \* an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, \* \* \* the administering authority, [if a request for

such a review has been received and] after publication of notice of such review in the Federal Register, shall—

\* \* \*

(B) review, and determine \* \* \*, the amount of any antidumping duty, \* \* \*.

Pub.L. 96-39, § 751, 93 Stat. 144, 175 (1984) (19 U.S.C. § 1675(a) (1982)). The underscored language represents the amendment made pursuant to § 611(a)(2)(A) of the Trade and Tariff Act of 1984, Pub. L. 98-573, § 611(a)(2)(A), 98 Stat. 2948, 3031 (1984) (19 U.S.C. § 1675(a) (1985)). Thus, while annual reviews were automatically required, the 1984 amendment, enacted on October 30, 1984, requires these reviews be conducted only upon the receipt of a request. Pursuant to this amendment, on August 13, 1985, the ITA issued a final rule providing that for periods ending prior to September 1, 1985, a request for review would have to be received within forty five days of receipt of the notice (or no later than October 31, 1985), and an interim-final providing for periods ending after September 1, 1985, requests were to be submitted in the anniversary month of the publication date of the antidumping finding. 50 Fed. Reg. 32558, 19 C.F.R. § 353.53a.

Although no request was submitted in December 1985, the anniversary month, plaintiffs argue that the regulations cannot be applied to their entries based on an analysis of the effective date provision of the 1984 Act. Section 626 provides in relevant part:

(a) except as provided in subsections (b) and (c), this Act, and the amendments made by it, shall take effect on the date of the enactment of this Act.

(b)(1) The amendments made by sections 602, 609, 611, 612, and 620 shall apply with respect to *investigations initiated* by petition or by the administering authority under subtitles A and B of Title VII of the Tariff Act of 1930 on or after such effective date. [Emphasis added.]

Pub. L. 98-573, § 626, 98 Stat. 2948, 3042 (1984). The ITA has interpreted the term investigation in § 626 to include § 751 reviews. It is plaintiffs' interpretation that only for those new investigations initiated after October 30, 1984, would there have to be a request to conduct subsequent reviews. Since the *investigation* in this instance was initiated in 1973, then automatic annual reviews were still required. Thus, plaintiffs submit the regulations, which do not distinguish between investigations initiated before and after October 30, 1984, are not applicable to plaintiffs' entries.

Section 626 of the 1984 Act clearly refers to "*investigations initiated*" by petition \* \* \* under subtitles A and B of Title VII of the Tariff Act of 1930." Subtitles A and B refer to the *initiation of investigations* including the imposition of antidumping and countervailing duties. However, these subtitles do not include the review procedures of § 751. Section 751 of the 1979 Act, as amended, is en-

compassed under subtitle C of Title VII of the Tariff Act of 1930. Therefore, a careful reading of § 626 does not support defendants' position that the term "investigation" includes review, and it appears that plaintiffs are entitled to a review of their 1984-1985 entries. See also *Badger-Powhatan v. United States*, 10 CIT —, 638 F. Supp 344, 346 n.2 (1986).

Defendants refer to the decision in *Al Tech Specialty Steel Corp. v. United States*, 745 F.2d 632 (Fed. Cir. 1984) holding that "investigation" includes more than just the investigatory stage. The issue however, was whether verification is required during the assessment stage of a "proceeding," which practically speaking occurs at the first § 751 annual administrative review. 745 F.2d at 635. While the court did state that "a § 751 review results in a final determination in an investigation," 745 F.2d at 642, this is secondary to the basic tenet of the decision. The court, in reviewing legislative history, determined that Congress intended no limitation on verification to only the investigative stage, even though the distinction between "proceeding" and "investigation" may have some other application. 745 F.2d at 640. The court was not required to interpret the unambiguous language in § 646; rather, it was confronted with 19 U.S.C. § 1677e(a), the verification provision, containing different phraseology.

Defendants maintain that the purpose of the amendment was to eliminate the burdensome responsibility imposed upon Commerce to conduct reviews where interested parties were satisfied with the existing order, and Congressional intent would be frustrated if this Court were to accept plaintiffs' position. While there is no doubt that Congress intended to reduce the Commerce burden, H.R. Rep. No. 98-725, 98th Cong., 2d Sess. 22-23; H.R. Rep. No. 98-1156, 98th Cong., 2d Sess. 180-181, it appears unambiguous that this measure would not affect subsequent reviews of investigations already initiated but would be effective only for investigations begun after October 30, 1984. This interpretation is further supported by § 1886(b) of the Tax Reform Act of 1986. Pub. L. 99-514, 100 Stat. — (October 22, 1986). That section, entitled TECHNICAL CORRECTIONS TO COUNTERVAILING AND ANTIDUMPING DUTY PROVISIONS, provides that § 626(b)(1) of the Trade and Tariff Act is amended to include "and to reviews begun under § 751 of that Act,". Therefore, § 626(b)(1) now reads:

The amendments made by sections \* \* \*, 611, \* \* \* shall apply with respect to investigations initiated by petition or by the administering authority under subtitles A and B of Title VII of the Tariff Act of 1930 and to reviews begun under § 751 of that Act, on or after such effective date.

Plaintiffs contend that while this might be curative legislation it may not be retroactively applied to deprive plaintiffs of their vested substantive rights in the cash deposits. Defendants argue that this does nothing to change the law but merely clarifies the "inartfully

drawn language" in § 626(b)(1), and nonetheless it may be applied retroactively.

The Court finds nothing in the legislative history of the 1986 Act to indicate that Congress intended to cure any defect in its prior enactment. The Senate Finance Committee Report, No. 99-313, 99th Cong., 2d Sess. at 1082, states that the effective date provision of the 1984 Act will now apply to reviews of outstanding antidumping orders as well as to new investigations, which "is consistent with the Congressional intent of these amendments to reduce the cost and increase the efficiency of proceedings." Where, in the 1986 Tax Act Congress intended to "clarify" or "correct" language from a previous act, the legislative history has so indicated. See Senate Finance Committee Report, *supra* at 1082 (in reference to § 1886(b)(4): "this bill also *clarifies* \* \* \*"); (in reference to § 1886(a): "this bill *corrects errors* in \* \* \*"). Furthermore, there is nothing to indicate that Congress intended that this law have retroactive effect. As the Supreme Court has stated:

The first rule of construction is that legislation must be considered as addressed to the future, not to the past \* \* \* [and] a retrospective operation will not be given to a statute which interferes with antecedent rights \* \* \* unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature'.

*United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Greene v. United States*, 376 U.S. 149, 160 (1964) (quoting *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)). Nonetheless, it has been represented that plaintiffs have submitted a request for a review on October 17, 1986, which is before the 1986 Act was signed into effect. Therefore, the 1986 Act in no way impedes plaintiffs' claim.

Where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). However, while the agency's construction of a statute which it has been entrusted to administer is normally entitled to great weight, where the language of the statute is unambiguous, the court and the agency must give effect to this clearly expressed intent. *Id.* at 842-843. Thus, the regulations do not apply to plaintiffs' entries and no request for review was required.

Plaintiffs next contend that the regulations violate § 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553, in failing to provide for notice and comment. These procedures must be provided prior to agency promulgation of substantive rules. However, interpretive or procedural rules are not subject to these requirements. Nor is this section applicable when the agency, for good cause, determines with stated reasons, that such procedures are impractical unnecessary or contrary to public interest. § 553(b)(A) and (B).

Plaintiffs claim that despite the label, this rule has substantial impact on the parties effected and is not just a housekeeping rule. The regulation in issue, requiring the submission of a request in the anniversary month, was issued as an interim-final rule on August 13, 1985, and deemed effective immediately. 50 Fed. Reg. 32558. The ITA characterized this as a procedural rule and stated that the cost of delay associated with notice and comment was outweighed by the benefit of immediate implementation. However, Commerce did invite public comment before this became a final rule. *Id.* Further, this rule was issued pursuant to the Commerce interpretive rule reading § 626(b)(1) as having immediate effect and requiring implementation on its date of enactment. 50 Fed. Reg. 5746-5748 (February 12, 1985). Since it is the opinion of the Court that plaintiffs have met their burden in demonstrating that these regulations are not applicable to their 1984-1985 entries, it is not imperative that the Court determine at this juncture whether the interim-final rules were subject to § 553. Nonetheless, the Court notes that plaintiffs have presented questions which are serious, substantial, difficult and doubtful, therefore plaintiffs' burden in demonstrating success on the merits is minimized. *British Steel Corp. v. United States*, 10 CIT —, Slip. Op. 86-119, at 5 (Nov. 12, 1986). While, the scheme for submitting requests appears to be procedural in nature, since it prescribes a timetable for asserting substantive rights, *Lamoille Valley R. Co. v. I.C.C.*, 711 F.2d 295, 328 (D.C. Cir. 1983), the time allotted may be so short and the procedural hurdles so great, that parties are foreclosed from having a meaningful consideration of the underlying controversy. *Id.* at 328.

Furthermore, there was no deadline prescribed in the 1984 statute as to when administrative action was to be taken. See *Lamoille Valley*, *supra*. Therefore, when Commerce stated there was urgency in issuing this interim-final rule, the fact that it was proposed ten months after the "effective date" of the statute does not support defendants' justification of the "good cause" exception. In reference to the regulation providing for liquidation of entries at the rate on deposit, it arguably has substantial impact on the parties affected. See *Lamoille Valley*, 711 F.2d at 328 ("the issue is one of degree—whether the substantive effect is sufficiently grave so that notice and comment are necessary to safeguard the policies underlying the APA".)

Plaintiffs have further attempted to demonstrate that an equitable estoppel principle is applicable to prevent the Government from benefitting from the inaccurate advice of the two case analysts. The Court is not persuaded by the arguments made by plaintiffs. Notwithstanding the vehement dissent in the case, *United States v. Federal Insurance Co., and Comets, Inc.*, Appeal No. 85-2343 (Fed. Cir. November 10, 1986), has reaffirmed that estoppel is not available against the government when it acts in its sovereign rather than proprietary capacity. It is doubtful whether the interpretation

of the regulations by the case analysts constituted "affirmative misconduct" and whether it was reasonable for plaintiffs to rely on such advice. See *Heckler v. Community Health Services of Crawford*, 467 U.S. 51, 60-61 (1984); *Schweiker v. Hansen*, 450 U.S. 785 (1981). Defendants refer to the notices issued by the ITA which directed interested parties to contact the Assistant General Counsel for Import Administration, and the letter of August 30, 1985, signed by the Director of Compliance, pointing to plaintiffs' failure to consult these representatives. Whether or not plaintiffs believed that the case analysts were more familiar with their case, and would know the applicability of the new regulations, did not prevent plaintiffs from contacting higher authorities in the ITA, especially in light of the interpretative rule issued in February 1985. Finally, the issue as to whether the ITA effectively waived the filing requirements, based on the case analysts representations is founded on this equitable principle, since there is no legal basis for waiving the requirement. Thus, for the same reasons stated above it appears that there is no estoppel available against the government to deny the effects of any possible waiver.

In balancing the hardships by granting this injunction, the Court can find nothing more than an inconvenience to the government in having to conduct an administrative review. While the government acts as merely a stakeholder, the plaintiffs stand to lose the sum of money on deposit. In these circumstances, the balance of hardships clearly weigh in plaintiffs favor. *Timken Co. v. United States*, 6 CIT 76, 81, 569 F. Supp. 65, 71 (1983). Where the denial of this injunction would inflict irreparable harm on plaintiffs, and where they have presented serious legal questions, it is appropriate for this Court to issue an injunction to maintain the status quo. *American Air Parcel Forwarding*, 1 CIT 293, 298-299, 515 F. Supp. 47, 53 (1981). The Court finds that it would be in the public interest to grant this injunction. "The public interest is best served when agencies act in conformity with a statutory mandate designed to achieve goals inuring to the public benefit." *Hyundai Pipe Co., et. al. v. United States*, 10 CIT —, Slip. Op. 86-114 at 11 (November 5, 1986). Clearly, the suspension of liquidation pending the results of the review poses no harm to the public, while the accurate determination as to plaintiffs' dumping margin does foster the orderly administration of the antidumping laws which benefits the public.

#### CONCLUSION

The Court finds that plaintiffs have met their burden as to demonstrating the requirements for the issuance of a preliminary injunction. Therefore, plaintiffs' motion is granted and defendants' motion to dismiss is denied. The Customs Service is enjoined from liquidating plaintiffs' entries from 12/1/84-9/18/85 pending the final outcome of this action. So ORDERED.

(Slip Op. 87-11)

PQ CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND RHONE POULENC, INC., AND RHONE POULENC, S.A., DEFENDANT-INTERVENORS

Court No. 84-12-01709

[ITA determination remanded for further proceedings.]

(Decided January 27, 1986)

*Mandel, Grunfeld & Sosnov* (Bruce Mitchell and Steven R. Sosnov) for plaintiff.

*Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*Sheila N. Ziff*), Civil Division, United States Department of Justice, for defendant.

*Donohue and Donohue* (John M. Peterson and James A. Geraghty) for defendant-intervenors.

#### OPINION AND ORDER

RESTANI, *Judge*: Plaintiff, a U.S. producer of anhydrous sodium metasilicate (ASM), challenges the final results of the third administrative review, made pursuant to 19 U.S.C. § 1675 (1982), by the United States Department of Commerce, International Trade Administration (ITA), of an antidumping order on ASM imported from France. In its review the ITA determined that dumping margins no longer exist for ASM, that no antidumping duty would be assessed, and that 60 percent cash deposits of estimated antidumping duties were no longer required. This matter is before the court pursuant to plaintiff's motion for judgment upon an agency record under Rule 56.1.

The question presented is whether ITA's determinations are supported by substantial evidence in the record and are otherwise in accordance with law, 19 U.S.C. § 1516a(b)(1)(B) (1982). Specifically:

(1) Whether ITA erred in considering the only importation of ASM from France during the review period, where the importation was admittedly made for the purpose of adjusting antidumping cash deposit rates;

(2) Whether ITA erred in determining United States price by applying purchase price to a transaction between a foreign manufacturer's U.S. subsidiary and an unrelated U.S. buyer, which occurred prior to importation;

(3) Whether ITA erred in not deducting the deposit of estimated antidumping duties from United States price, where the deposit was paid by the exporter's subsidiary without being passed onto the U.S. buyer, and where, as to the relevant merchandise, no antidumping duty was ever actually assessed;

(4) Whether ITA erred in basing its weighted average foreign market value upon home market sales of identical merchandise made during a 30 day period extending past the exportation or sales date.

## BACKGROUND

On January 7, 1981, ITA published an antidumping order which, in pertinent part, directed Customs to require cash deposits of estimated antidumping duties in the amount of 60 percent *ad valorem* on ASM imported from France. 46 Fed. Reg. 1667 (1981). This 60 percent deposit rate remained in effect during the first and second administrative reviews of the antidumping order, during which time there had been no shipments of ASM. 47 Fed. Reg. 15620 (1982); 47 Fed. Reg. 44594 (1982).

Although defendant-intervenors claimed that the conditions which gave rise to the initial dumping had changed,<sup>1</sup> ITA's position was that it was without power to adjust cash deposit rates without an actual importation made during the period of review. In meetings with defendant-intervenors, ITA officials suggested that making an actual importation was the proper way to establish that conditions had changed. As a result, a "decision was made to make one sale in a commercial quantity to provide a predicate for the deposit adjustment." Intervenor's Brief at 5-6.

A single shipment of ASM was imported from France in 1982 pursuant to a back-to-back sale and resale involving Rhone Poulenc, S.A. (Rhone France), its U.S. subsidiary, Rhone Poulenc, Inc. (Rhone U.S.), and an unrelated U.S. buyer.<sup>2</sup> The transactions occurred as follows: July 7, 1982, Rhone U.S. placed an order with Rhone France;<sup>3</sup> July 9, Rhone France confirmed Rhone U.S.'s order, Rhone U.S. recorded an order for an unrelated U.S. buyer, and the buyer confirmed its order; July 19, the merchandise was exported from France; and July 27, the merchandise was imported into the United States in the name of Rhone U.S. and sent directly from the port of entry to the U.S. buyer.

The 60 percent deposit of estimated antidumping duties was paid by Rhone U.S., through its broker and apparently was never included in the price paid by the U.S. buyer.

In the third administrative review, which covered the July 1982 sale of ASM, ITA determined that no dumping margins existed for 1982, that antidumping duties should not be assessed upon the 1982 entry, and that no cash deposits of estimated antidumping duties shall be required until publication of the final results of the next administrative review. 49 Fed. Reg. 43733 (1984). It is this third review which is at issue.

<sup>1</sup> Defendant-intervenors state that the principal change has been that of exchange rates, which went from slightly over 4 francs to the dollar, during the initial importation, to nearly 7 francs to the dollar, during the July 1982 importation. They note that this devaluation of approximately 40 percent largely closed the 60 percent dumping margin.

<sup>2</sup> Additional background information regarding the parties and merchandise at issue may be found in this court's prior opinion. *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 592 F. Supp. 1318 (1984).

<sup>3</sup> The record indicates that "[r]egarding the single sale of ASM in the United States during the period of review, the first contact between [Rhone U.S.] and [the unrelated U.S. buyer] was on July 7, 1982." [C.R. 9 at 2]. [References to the confidential record will be designated "C.R. —" and references to the public record will be designated "P.R. —." References to specific page numbers or sections will be indicated where appropriate.] There is nothing in the record to establish the exact nature of this contact, however, and it was not until July 9, 1982, that the unrelated U.S. buyer actually placed its order with Rhone U.S. [C.R. 9, Exhibit 2-D; C.R. 3].

## I. ANNUAL REVIEW BASED UPON A SINGLE ENTRY

Section 751 of the Tariff Act of 1930 provides for administrative review of antidumping duty orders. At the time of the third review, section 751(a) required, in pertinent part, that ITA review its antidumping duty orders at least once a year,<sup>4</sup> and that it:

shall determine—

(A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and

(B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.

19 U.S.C. § 1675(a)(2) (1982). The statutory definition of foreign market value provides that "[i]n the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account." 19 U.S.C. § 1677b(a)(1) (1982). There is no comparable provision in the statute's definition of United States price. See 19 U.S.C. § 1677a (1982).

## A. "EACH" ENTRY

Plaintiff argues that, in conducting its third administrative review, pursuant to section 751(a), ITA should not have determined the foreign market value and United States price of the July 1982 entry. Specifically, plaintiff states that "[o]ne entry alone in a given year does not fit into the statutory mold" and, relying upon a dictionary definition of the word "each" as it is used in § 751(a), asserts that "[t]here must be more than one entry to use correctly the word 'each.'" In addition, plaintiff contends that "*an 'actual sale' for the purpose of creating a fictitious market is no sale at all,*" Plaintiff's Brief at 12, and urges that "to affirm the Congressional intent, common sense, and reality, section 773(a)(1), 19 U.S.C. § 1677b(a)(1) [the definition of foreign market value] should be read *in pari materia* with the provisions relating to United States price, section 772, 19 U.S.C. § 1677a." *Id.* at 13-14.

Plaintiff's reliance upon the dictionary definition of the word "each"<sup>5</sup> if allowed to govern interpretation of section 751(a), would lead to absurd results that are contrary to Congressional policy. As the court has noted in an earlier interpretation of section 751(a):

[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

<sup>4</sup> One of the changes made to 19 U.S.C. § 1675 in 1984 was to provide for such annual reviews "if a request for such review has been received." The 1984 amendments, however, do not apply to the third administrative review at issue.

<sup>5</sup> Plaintiff cites the following definition for the word "each" Syn. 1. EACH, EVERY are alike in having a distributive meaning. Of two or more members composing a (usually) definite aggregate, EACH directs attention to the separate members in turn: *Each child* (of those considered and enumerated) *received a large apple* \* \* \*. *The Random House Dictionary of the English Language*, Unabridged 447 (1966).

*Asahi Chemical Industry Co., Ltd. v. United States*, 4 CIT 120, 124, 548 F. Supp. 1261, 1265 (citing *Learned Hand in Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945)).

In *Asahi* the court rejected the literal interpretive approach of the plaintiff and party-in-interest and, after examining related statutory provisions and their legislative history, concluded that:

These statutory provisions and the legislative history set out above thus evidence Congress' intent that the ITA is to consider only the actual entry, sale and purchase of merchandise when calculating antidumping duty assessments and estimates under section 751(a). Projecting how Congress would have dealt with the concrete situation of determining LTFV margins when no shipments occur during a review period, it is reasonable to conclude that Congress would have directed the ITA to use the most recent price and value information available based on actual entries, sales, and purchases of merchandise—as the ITA has consistently done.

4 CIT at 127, 548 F. Supp. at 1267. The court rejected *Asahi's* interpretation that ITA must limit its review exclusively to facts and circumstances as they exist during the review period, even when there has not been a single entry during the period. *Id.* The court noted that *Asahi's* interpretation, taken to its logical extreme would lead to the absurd conclusion that in the absence of entries during a review period, U.S. price is no longer less than foreign market value, and thus there can be no antidumping margin. 4 CIT at 127-28, 548 F. Supp. at 1267.

Plaintiff cites *Asahi* in arguing that "[f]or much the same reason that the court did not permit the absence of a shipment to erase the estimated deposit requirement, it should not permit the presence of *this one* sale to do the same: viz. such would be contrary to the intent of Congress." Plaintiff's Brief at 9. As the court made clear in *Asahi*, Congress' intent was that "ITA is to consider only the actual entry, sale and purchase of merchandise when calculating antidumping duty assessments and estimates under section 751(a)." 4 CIT 127, 548 F. Supp. at 1267. ITA has not based its determination upon the absence of data, but rather it used the most recent price and value information available based upon an actual entry and sale of merchandise to calculate United States price, and actual foreign sales to calculate foreign market value.

The court finds no expression of Congressional intent to require ITA to disregard an actual entry, where that entry is made during a period that includes no other entries. Congress' reference to "each entry" was most likely merely an expression of its intention that antidumping duties determined pursuant to administrative reviews should be based on an entry-by-entry basis. See H.R. Rep. No. 317, 96th Cong., 1st Sess. 71 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 79 (1979). Where there is only one entry made during a review period, ITA's determination will clearly be made on an entry-by-entry

basis, and there is no reason to interpret the reference to "each entry" as requiring anything more.

#### B. FICTITIOUS SALE

Defendant-intervenors readily concede that the July 1982 sale was intended to "provide a predicate for the deposit adjustment"; however, they assert, along with the defendant, that the sale was *bona fide* in every respect, and that in any event, Congress would never have intended the fictitious market analysis to be applied in the definition of United States price.

The fictitious market analysis prevents parties from manipulating dumping margins by either setting up pretended sales, or offering merchandise at a price that does not reflect its actual market price. In the context of determining United States price, pretended sales between related or interested parties could thwart Congressional intent. There is no indication of any such sales in this case. In its investigation, ITA found no evidence of any relationship or dealings between the U.S. buyer and defendant-intervenors that might indicate that the sale was other than a *bona fide* arm's length transaction. Furthermore, since the price which the U.S. buyer paid to Rhone U.S. was lower than the price charged by its United States supplier, the U.S. buyer's actions were consistent with good business practices of purchasing acceptable material at considerable savings.

In the absence of any evidence that the 1982 sale was anything less than a *bona fide* arm's length transaction, there is no need to read the fictitious market analysis into the determination of United States price. As a practical matter, there is no danger of foreign producers thwarting Congressional intent by creating fictitious markets in the United States via arm's length transactions. To do so, a producer would either have to lower the United States price of its merchandise below market value (in which case a greater dumping margin would result) or the producer would have to raise the price above the market value (in which case the producer would have difficulty finding an arm's length buyer). Neither situation presents a problem that would not be adequately addressed by the statute as passed by Congress.

#### II. ITA'S USE OF PURCHASE PRICE

Plaintiff challenges ITA's selection of the Purchase Price (PP) rather than the Exporter's sales's price (ESP) methodology in computing United States price (USP).

In determining dumping margins, ITA begins with the actual price at which merchandise is exchanged between unrelated parties. That price is then adjusted through various additions and reductions to work back to an amount, called United States price, which can then be compared with the fair value, that is, foreign

market value of the merchandise in the producer's home market, to yield the dumping margin.

As the Court of Appeals for the Federal Circuit has explained:

United States price, as defined in section 1677a, is computed by one of two methods: purchase price or exporter's sales price. The antidumping law attempts to construct value on the basis of arm's length transactions. The arm's length sale takes place at different points in the chain of commerce depending on whether the goods traveled through a related importer or through an independent, unrelated importer. Thus, different methods of computation of United States price are required depending on the relationship of the importer to the foreign producer.

Where the producer is an unrelated, independent party, purchase price is used. Purchase price is the actual or agreed-to price between the foreign producer and the independent importer, prior to the time of importation. Where the importer is related, an arm's length transaction does not occur until the goods are resold to a retailer or to the public. In that case, "exporter's sales price" is used. Exporter's sales price is the price at which the goods are eventually transferred in an arm's length transaction, whether from the importer to an independent retailer or directly to the public.

Both purchase price and exporter's sales price are subject to adjustment in order to derive a "fair" United States price for comparison with foreign market value. The adjustments provided in section 1677a(d) are applicable to both purchase price and exporter's sales price. The additional adjustments provided in section 1677a(e) are applicable *only* to exporter's sales price.

*Smith-Corona Group v. United States*, 713 F.2d 1568, 1572 (Fed. Cir. 1983) (footnotes omitted) (emphasis in original), *cert. denied*, 465 U.S. 1022 (1984).

The additional ESP adjustments referenced by the Court of Appeals are made for certain amounts associated with the sale of merchandise in the United States, typically, commissions for selling the merchandise in the United States, and sales expenses generally incurred in selling the same type of merchandise in the United States.<sup>6</sup> ESP adjustments, by their own terms, only apply where there has been sales activity associated with the sale of the merchandise at issue, or substantially identical merchandise, in the United States. Without these adjustments foreign producers, and their subsidiaries, could compete unfairly in the U.S. market by

<sup>6</sup> 19 U.S.C. § 1677a(e) provides as follows:

(e) Additional adjustments to exporter's sales price

For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

(1) commissions for selling in the United States the particular merchandise under consideration,

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and

(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

spending amounts on marketing and selling their products that are in excess of what they spend in their home markets.

To adjust for certain activities in the United States, the ESP calculations start with the actual price involved in the arm's length transaction between the importer and an unrelated purchaser in the United States, and work back to an estimation of the price the producer received for the merchandise. See *Brother Indus., Ltd. v. United States*, 3 CIT 125, 140-41, 540 F. Supp. 1341, 1357 (1982), *aff'd sub nom. Smith-Corona Group*, 713 F.2d at 1568. As Congress explained when it first introduced ESP and these adjustments in 1921: "'exporter's sales price' is defined in such manner as to make the price the net amount returned to the foreign exporter." S. Rep. No. 16, 67th Cong., 1st Sess. 12 (1921).

In the present case, Rhone France sold the ASM to its related U.S. importer, Rhone U.S. Only the actual price at which Rhone U.S. sold the ASM in the United States will be used in calculating USP. That price, however, must cover Rhone U.S.'s costs involved with selling ASM in the United States. Although Rhone U.S.'s selling expenses have not been verified, Rhone France indicates that such expenses exceed the home market selling expense. [C.R. 1 Section B & C]. Despite the fact that the record has not been developed to provide for ESP adjustments, it is highly likely that the actual price upon which USP is calculated includes various costs involved with selling ASM in the United States, and may include sales commissions. If these are not adjusted for, the resulting USP will not provide an appropriate price for comparison with foreign market value.<sup>7</sup>

#### A. STATUTORY DEFINITIONS OF PURCHASE PRICE AND EXPORTER'S SALE PRICE

In its final determination, ITA distinguished its application of PP in this review period from its prior application of ESP in the original fair value investigation by stating that "[i]n this review period the sales to the unrelated U.S. customer occurred prior to the date of importation." 49 Fed. Reg. 43733, 43734.<sup>8</sup> The mere fact that a sale was made prior to importation does not provide a sufficient basis for applying PP rather than ESP. While the application of PP is limited to certain transactions that occur "prior to the date of importation," ESP price applies to other transactions that occur either "before or after the date of importation." 19 U.S.C. § 1677a(b) & (c)

<sup>7</sup> Of course, if no such cost exists, the result should be equivalent to that obtained with the particular kind of PP methodology utilized here. In such a case no prejudice would result from utilization of ESP.

<sup>8</sup> Throughout the record and in ITA's arguments to this court, it is apparent that ITA generally interprets sales to unrelated parties that occur prior to importation to automatically satisfy the definition of PP, while being beyond the scope of the definition of ESP.

(1982).<sup>9</sup> Thus, where a sale is made to an unrelated party prior to importation, the determination of whether PP or ESP applies must be based upon additional circumstances.

ITA now distinguishes the transaction at issue from an ESP transaction occurring "before \* \* \* the date of importation," by asserting that in this case Rhone U.S. "acted as a mere conduit, or sales agent, for a direct sale of merchandise from Rhone France to [the unrelated U.S. purchaser] for exportation to the United States." Defendant's Response to Court Questions at 3. Whatever the legal merits of ITA's distinction, its characterization of the transaction at issue is not supported by the record.

There is no reference in the record to any direct contacts or agreements between Rhone France and the unrelated U.S. purchaser. As the verification report on Rhone France summarized, "[t]hroughout these documents, the U.S. customer is recorded as Rhone-Poulenc, Inc. [Rhone U.S.]. There is no mention of the unrelated U.S. customer. Documentation of [Rhone U.S.]'s sale and selling price to the unrelated U.S. customer \* \* \* can only be verified at [Rhone U.S.]'s offices in the U.S." [C.R. 7 at 2].<sup>10</sup>

There were two separate transactions in this case. In the first, Rhone U.S. purchased ASM directly from Rhone France, for exportation to the United States. In the second, Rhone U.S. turned around and resold that ASM in the United States, under different terms of sale. Rhone U.S. placed its order for ASM with Rhone France on July 7, 1982. [C.R. 7 Exhibit 1 (Telex, Purchase Order); P.R. 22 at 72; 49 Fed. Reg. 43733, 43734]. That order was confirmed by Rhone France on July 9, 1982. [C.R. 7 Exhibit 1 (Acknowledgment of Order)]. It was not until then, July 9, that the unrelated purchaser actually placed its own order for the ASM with Rhone U.S. [C.R. 9 Exhibit 2-D (Rhone U.S.'s Order Form); C.R. 3 (U.S. buyer's Purchase Order "Confirmation"); P.R. 22 at 72; 49 Fed. Reg. 43733, 43734]. The price at which the unrelated U.S. purchaser eventually ordered the ASM from Rhone U.S. was different from the price at which Rhone U.S. ordered the ASM from Rhone France. [C.R. 7 Exhibit 1; C.R. 9 Exhibit 2-D; C.R. 3]. There is no indication in the record that Rhone France was involved in actually

<sup>9</sup> During the relevant dates at issue, the definitions of USP, PP and ESP were defined at 19 U.S.C. § 1677a as follows:

(a) United States Price.

For purposes of this subtitle, the term "United States price" means the purchase price, or the exporter's sale price, of the merchandise, whichever is appropriate.

(b) Purchase price

For purposes of this section, the term "purchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from the manufacturer or producer of the merchandise for exportation to the United States. Appropriate adjustments for costs and adjustments under subsection (d) of this section shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

(c) Exporter's sales price

For purposes of this section, the term "exporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted under subsections (d) and (e) of this section.

<sup>10</sup> A memorandum in the file responds to the absence of documentation by stating that "the documents on file at [Rhone France] and examined by the verifying officers would not normally refer to any transaction between [Rhone U.S.] and the unrelated U.S. Customer, especially since [Rhone U.S.] is listed as the importer of record for Customs purposes." [P.R. 42]. The court notes that the Customs Invoice on file at Rhone France required the names of the "CONSIGNEE," and the "BUYER (if other than consignee)." Rhone U.S. was listed as the consignee, but the space provided for the buyer was left completely blank. [C.R. 7 Exhibit 1].

setting or approving Rhone U.S.'s sale price to the unrelated U.S. purchaser.<sup>11</sup> In fact, even Rhone France considered Rhone U.S. to be a reseller who purchases at one price, and resells at a higher price (rather than a commission earning agent). [C.R. 1 Section B].

ITA argues that there is no statutory requirement, explicit or otherwise, that the importer must be an independent party in order to apply PP, and maintains that the court of appeals "inadvertently mischaracterized the transactions at issue involved in purchase price and exporter's sales price." Defendant's brief at 24. While the statute does not state in so many words that PP and ESP are to be distinguished by the relationship of the foreign producer to the U.S. importer, the statutory definitions of PP and ESP have been distinguished upon this basis from their inception. See *Smith-Corona*, 713 F.2d at 1568; S. Rep. No. 16, *supra*, at 11; *Timken Co. v. United States*, 630 F. Supp. 1327, 1341 (CIT 1986); *Administration of the Antidumping Act of 1921: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 2d Sess., 16 (1978) (Statement of Robert E. Chasen, Commissioner of Customs); Staff of Senate Comm. on Finance, 90th Cong., 2d Sess., *Compendium of Papers on Legislative oversight of U.S. Trade Policies* 162 (Comm. Print 1968) (statement of J.P. Hendrick, Special Assistant to Secretary of the Treasury).

The express terms of the statute make it clear that a U.S. importer's relationship to a foreign producer will affect the determination of whether PP or ESP will apply. The definition of "exporter" includes certain related importers, and thereby permits sales by the importer to be imputed to the foreign producer so that ESP will apply. 19 U.S.C. § 1677(13). On the other hand, the statute provides no mechanism for imputing actual sales by an importer to that importer's related "foreign manufacturer or producer of the merchandise," so that PP will apply.

In this case, the importer of record, Rhone U.S., was related to the producer, Rhone France, and falls within the statutory definition of exporter. As a result, the price at which Rhone U.S. sold the ASM to the unrelated buyer was "the price at which merchandise [was] \* \* \* sold in the United States, before \* \* \* the time of importation, by or for the account of the exporter [Rhone U.S.]" within the meaning of ESP. 19 U.S.C. § 1677a(c). ITA concedes that a single import transaction can not be both an ESP and a PP transaction. Thus, this is not a case where ITA has discretion to apply one or the other methodology to a given set of facts. In any event, the price at which Rhone U.S. sold ASM to the unrelated buyer was *not* "the price at which merchandise [was] \* \* \* purchased, prior to the date

<sup>11</sup> Apparently, the only portion of the record that appears to support defendant's position is the verifying officer's statement in the report of Rhone U.S. The statement characterizes the unrelated purchaser as the importer, implies that the unrelated purchaser placed an order on July 7, 1982, that Rhone U.S. did no more than telex the unrelated purchaser's order that same day, and that it was the unrelated purchaser's order which was confirmed by Rhone France. The evidence clearly establishes, however, that Rhone U.S. was the importer of record, [C.R. 4] that it actually placed an order with Rhone France on July 7, 1982, [C.R. 7, Exhibit 1], that Rhone U.S.'s order was acknowledged on July 9, 1982, *id.*, and that on that same day, the unrelated U.S. purchaser ordered the ASM from Rhone U.S., [C.R. 9, Exhibit 2-D (Rhone U.S. [telephone] Order Form)], and confirmed that order. [C.R. 3]. See [P.R. 22 at 72]; 49 Fed. Reg. 43733, 43734.

of importation, from the manufacturer or producer of the merchandise [*Rhone France*] for exportation to the United States" within the meaning of PP. 19 U.S.C. § 1677a(b).

#### B. LEGISLATIVE HISTORY OF THE 1979 REVISION

Defendants cite the legislative history to the Trade Agreements Act of 1979 in arguing that Congress intended to allow PP to apply in a situation such as this—where the producer's related U.S. importer sells merchandise to an unrelated U.S. buyer, prior to importation. Even though the meaning of the statutory language appears to be clear, the use of legislative history as an aid to construction of the statute may be proper. *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1975) (citing *United States v. American Trucking Assns.*, 310 U.S. 534, 543-44 (1940) (footnotes omitted)).

The legislative history cited by defendants is that of the Trade Agreements Act of 1979, which repealed the Antidumping Act of 1921 and reenacted its provisions as part of the Tariff Act of 1930. In the process, the term "United States price" was introduced into the statute, and the definition of PP was changed. Under the Antidumping Act of 1921, PP had been defined as:

\* \* \* the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported \* \* \*.

19 U.S.C. § 162 (1976) (emphasis added) (repealed). When it was enacted into the Tariff Act of 1930, PP had been redefined as:

\* \* \* the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from the manufacturer or producer of the merchandise for exportation to the United States \* \* \*.

19 U.S.C. § 1677a(b) (emphasis added). Congress explained the need for these changes as follows

The purpose of this modification is to provide statutory authority for the present administrative practice whereby if a producer knew that merchandise was intended for sale to an unrelated purchaser in the United States under the terms of sale fixed on or before the date of importation, the producer's sale price to an unrelated middleman will be used as the purchase price. Thus, the dicta in *Voss International v. United States*, C.D. 4801, (May 7, 1997) is explicitly overruled, and 'purchase price' may be used if transactions between related parties indicate that the merchandise has been sold prior to importation to a U.S. buyer unrelated to the producer. The Committee understands that the executive branch intends to issue regulations, consistent with present practice, under which sales from the foreign producer to middlemen and any sales between middlemen before sale to the first unrelated U.S. purchaser are examined to avoid below cost sales by the middleman.

H.R. Rep. No. 317, *supra*, at 75; see also S. Rep. No. 249, *supra*, at 94; H.R. Doc. No. 153, 96th Cong., 1st Sess. 411-12 (1979).

Defendants make much of Congress' reference to administrative practice and statement that " 'purchase price' may be used if transactions between related parties indicate that the merchandise has been sold prior to importation to a U.S. buyer unrelated to the producer." To be understood, that statement must be viewed in its full context.

The 1979 amendment of the definition of PP provided statutory authority for a specific administrative practice. That practice, as Congress explained, involved using "the producer's sale price to an unrelated middleman" as the PP, where the producer knows that the merchandise is intended for sale to an unrelated U.S. buyer, prior to importation. H.R. Rep. No. 317, *supra*, at 75; S. Rep. No. 249, *supra*, at 94. It was that practice that was involved in the *Voss* case cited by Congress, and questioned where the producer's sale price to an unrelated middleman was followed by transactions between related parties.<sup>12</sup> Congress made no reference to any practice of applying PP to the price at which the producer's related U.S. importer actually sells to an unrelated buyer. In fact, neither the parties, nor the court, have been able to produce any administrative decisions to demonstrate that such a practice existed at the time of the amendment.<sup>13</sup> To the contrary, after the 1979 Act was passed, both Treasury and ITA acknowledged that the specific administrative practice supported by the new definition of purchase price involved the producer's sale price to an unrelated middleman. 44 Fed. Reg. 59742, 59743 (1979) (Treasury proposed revision of the customs regulations relating to antidumping duties); 45 Fed. Reg. 8128, 8184 (1980) (ITA final rule and requests for comments).

Apart from the specific response to the problems raised by the *Voss* case, Congress indicated its intention to maintain the principle concepts of PP and ESP under the new law. See S. Rep. No. 249, *supra*, at 94 (The 1979 amendment "would generally continue existing law with respect to the meaning of purchase price and exporter's sales price"); and H.R. Doc. No. 153, *supra*, at 410 (1979) ("A new

<sup>12</sup> In *Voss* the Treasury Department sought to use the producer's sale price to an unrelated middleman, where that sale was then followed by a sale to a related middleman, and finally by a sale to an unrelated U.S. purchaser. *Voss International Corp. v. United States*, 82 Cust. Ct. 190, 473 F. Supp. 327 (1979), *rev'd on other grounds*, 628 F.2d 1328 (C.C.P.A. 1980). Treasury determined that one middleman (the exporter) was the purchaser and that the other middleman (the exporter's U.S. subsidiary) was the importer, and applied PP to the producer's sale price to the unrelated middleman. The court interpreted the existing statutory definition of PP to require that the purchaser and importer be the same person and thus rejected the administration's practice as contrary to law. 473 F. Supp. at 331. Viewed in this context, it is apparent that Congress was concerned that transactions between related middlemen not bar the use of PP where it is otherwise applicable.

The court also interpreted the definition of PP to preclude a purchase where the price is subject to exchange rate adjustments after the time of exportation. This interpretation was "overruled" when the reference to "exportation" was changed to "importation." See H.R. Doc. 153, *supra*, at 412. ("Moreover, 'purchase price' may be used if the price is determined or determinable prior to 'importation' of the merchandise, meaning the date of entry, or withdrawal from warehouse, for consumption.")

<sup>13</sup> Treasury determinations issued near the time of the 1979 amendment illustrate administrative practices involving the application of PP to: sales between a producer and an unrelated middleman (trading company), see, e.g., *Sorbates from Japan*, 43 Fed. Reg. 26175, 26176 (1978); sales between a producer and the unrelated purchasing agent of a U.S. buyer, see, e.g., *Perchloroethylene from Belgium*, 44 Fed. Reg. 6821 (1979); and sales between a producer and an unrelated U.S. buyer who acted as its own importer. See, e.g., *Saccharin from the Republic of Korea*, 42 Fed. Reg. 46091 (1977). Where PP and ESP were contrasted in a single determination, it became clear that Treasury's practice was not to apply PP where a related importer actually sells merchandise to an unrelated purchaser. See *Steel Wire Strand for Prestressed Concrete from Japan*, 43 Fed. Reg. 38495, 38496 (1978) ("Purchase price" . . . was used exclusively for four manufacturers since all sales for export were made to nonrelated customers in the United States. Exporter's sales price . . . was used for those sales in which a related importer acted as the seller of the merchandise.")

term, 'United States price,' will be used to embrace both the existing terms 'purchase price' and 'exporter's sales price,' the principle concepts of which will also be retained."). The principle distinction between PP and ESP has consistently been interpreted by legislatures and courts to turn on the relationship of the producer to the U.S. importer. See discussion, *supra*, at 18. This distinction was not relinquished by Congress' approval of the administrative practice of using the producer's sale price to an unrelated middleman as PP, where the producer knows that the merchandise is intended for sale to an unrelated U.S. buyer. Thus, the distinction survives application of PP to certain situations involving transactions between related middlemen.

ITA cites four of its determinations from 1982 to 1984 and argues that the court should be guided by ITA's construction of the statute, even though the enacting Congress was not presented with such a construction. One of those determinations involved sales to unrelated U.S. importers, where the producer's U.S. subsidiary did not participate directly in the sales. *Sorbital from France*, 47 Fed. Reg. 6459, 6460 (1982) ("Specific Issues of the Investigation"). In all four determinations, however, ITA based its application of PP solely upon the fact that arm's length sales were made *prior to importation*. Such reasoning renders most of the language used in the definitions of PP, ESP and "exporter" superfluous. Under ITA's construction, PP is expanded to cover all sales made prior to importation, while ESP is limited to sales after importation. This construction ignores all statutory reference to, and definitions of, the various actors as well as the distinctions between purchases "for exportation to the United States," as used in the definition of PP and sales "in the United States," as used in the definition of ESP. In addition, the phrase "before or after the time of importation," as used in the definition of ESP, is construed to refer only to sales "after the time of importation." ITA's construction is neither reasonable nor consistent with Congressional intent.

Application of PP to the case at hand, which clearly falls within the statutory definition of ESP, would abandon the principal concepts that have distinguished PP and ESP since they were first enacted in 1921, render the express terms of the statute meaningless, and disregard the purpose which the additional adjustments for ESP serve in antidumping determinations. In light of the above discussion it is clear that neither the language of the statute, nor its interpretation by the courts, nor its legislative history, nor the overall policy of U.S. antidumping legislation, supports application of PP to the facts of record here, that is, a case where a foreign producer exports, and its U.S. subsidiary imports, merchandise which is sold by the U.S. subsidiary for its own account to an unrelated purchaser prior to importation. Accordingly, the court finds that ITA's application of PP to all pre-importation sales is unreasonable and further, that based on the record before this court, that ITA

erred in its determination of USP and remands for recalculation of the dumping margin, pursuant to section 751, 19 U.S.C. § 1675 (1982).

### III. DEPOSITS OF ESTIMATED ANTIDUMPING DUTIES

ITA determined in its third administrative review that the 1982 sale of ASM from France was made without a dumping margin. In making this determination, ITA did not reduce USP by the amount of the deposit of estimated antidumping duty which was posted by Rhone U.S., the importer of record. Plaintiff claims that ITA erred in not reducing USP by the amount of the deposit, even where, but for those deposits, no duty would otherwise be assessed.<sup>14</sup>

Plaintiff argues that under the statute and its implementing regulations, ITA is required to deduct from its calculation of U.S. price the full amount of estimated antidumping duties that Rhone U.S. deposited on the July 1982 entry of ASM. The statute provides that U.S. price is to be reduced by:

\* \* \* the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and *United States import duties*, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States;

19 U.S.C. § 1677a(d)(2)(A); 19 C.F.R. § 353.10(d)(2)(i) (emphasis added). It is disputed whether "United States import duties," as used in the calculation of antidumping duties, refers to antidumping duties, either assessed or estimated.<sup>15</sup> There is no dispute, however, that the regulations provide for the deduction from U.S. price for:

\* \* \* the amount of any antidumping duties which are, or will be, paid by the manufacturer, producer, seller, or exporter, or which are, or will be, refunded to the importer by the manufac-

<sup>14</sup> Defendant-intervenor argues that this issue is improperly before the court because it is beyond the scope of plaintiff's complaint, and it was not raised before the ITA. This case involves the failure to raise one purely legal argument, not failure to participate or add factual data to the administrative record, and thus "[i]t is within this court's discretion to determine whether the particular manner of failure to exhaust administrative remedies warrants preclusion of consideration of the new issue." *Rhone Poulenc, S.A. v. United States*, 7 CIT 153, 583 F. Supp. 807 (1984). In this case ITA has not raised an exhaustion challenge. See *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975) (interpreting the government's failure to raise exhaustion challenge as a determination by the government that its reconsideration determination is "final"). In fact, defendants stipulated to the amendment of plaintiff's complaint by order of this court to include this issue. The court finds no prejudice to any of the parties (who all stipulated to the amendment of plaintiff's complaint) by allowing this purely legal issue to be raised in this court for the first time. *Rhone Poulenc, supra*; *Phillip Bros., Inc. v. United States*, 10 CIT —, —, 630 F. Supp. 1317, 1319-21 (1986); *American Permac, Inc. v. United States*, 10 CIT —, —, 642 F. Supp. 1187, 1188 n.2 (1986). Furthermore, defendants are not prejudiced here because they have prevailed on this issue. *Phillip Bros.*, 10 CIT —, —, 630 F. Supp. at 1324 n.11; *American Permac, Inc.*, 10 CIT at —, 642 F. Supp. at 1188 n.2.

<sup>15</sup> In an early case holding that antidumping duties were additional duties, rather than penalties subject to due process requirements, the court concluded that "Congress desired and intended that the additional duties provided for in [the 1921 Antidumping Act] should be considered as duties for all purposes." *C.J. Tower & Sons v. United States*, 21 CCPA 417, 428, 71 F.2d 438, 445 (1934) (interpreting the precursor to 19 U.S.C. § 1673i (1982), current version at 19 U.S.C. § 1677h (Supp. III 1985)). Another case noted that "19 U.S.C. 160-162 (1976) (repealed 1979)" \* \* \* makes it clear that in calculating purchase price or exporter's sales price there shall be deducted the amount of any special dumping duties which are, or will be, paid by the manufacturer, producer, seller or exporter, or which are, or will be, refunded to the importer by the manufacturer, producer, seller or exporter, directly or indirectly." *Pasco Terminals, Inc. v. United States*, 76 Cust. Ct. 204, 207, 416 F. Supp. 1242, 1244 (1976), *rev'd on other grounds*, 567 F.2d 976 (C.C.P.A. 1978).

It is noteworthy that antidumping provisions in other jurisdictions explicitly list antidumping duties as one of the adjustments to be made in constructing prices. Council Regulation (EEC) No. 3017/79 Article 2(8)(b)(ii), *reprinted in* J. Cunnane & C. Stanbrook, *Dumping and Subsidies* 138 (1983). As one commentator has stated: "[t]he reason for this is that if antidumping duties were not deductible in the construction of export prices an importer who was associated with an exporter who had been found to have been dumping could continue to resell the imported product at prices which had led to the finding of dumping or, at least, not pass on the full extent of the antidumping duty. This would clearly make a nonsense of the antidumping duty." *Id.* at 36.

turer, producer, seller, or exporter, either directly or indirectly  
\* \* \*

19 C.F.R. § 353.55 (1982).

Regardless of whether antidumping duties may be deducted from USP under 19 U.S.C. § 1677a(d)(2)(A), as United States import duties included in the price of merchandise, or only under 19 C.F.R. § 353.55, as antidumping duties paid or reimbursed by the manufacturer, producer, seller, or exporter, ITA determined that no antidumping duties were to be assessed in this case, and thus it declined to make any adjustments under either the statute or the regulation.

Under the Tariff Act of 1930, deposits of estimated antidumping duties must be posted for merchandise that is subject to an antidumping duty order. The amounts of these deposits are based upon past determinations of dumping margins involving previous entries. The amount of the actual antidumping duty that is eventually assessed on an entry of merchandise may vary significantly from the amount of estimated antidumping duties initially deposited on that entry. The difference between the deposit of estimated antidumping duties, and the actual assessed antidumping duties is either collected, or refunded with interest. See 19 U.S.C. § 1673f; 19 U.S.C. § 1677g; S. Rep. No. 249, *supra*, at 77.

The requirement of depositing estimated dumping duties was intended as a means of deterring dumping and speeding up the assessment of antidumping duties, but not of unduly burdening importers who have taken steps to eliminate dumping. H.R. Rep. No. 317, *supra*, at 69. ITA has been careful in its implementation of the Act not to allow the amount of estimated antidumping duties, based upon *past* dumping margins, to alter its determination of *present* dumping margins. If deposits of estimated antidumping duties entered into the calculation of present dumping margins, then those deposits would work to open up a margin where none otherwise exists.

Accordingly, ITA states that its practice regarding adjustments for antidumping duties is as follows. First, ITA makes an initial determination of whether the merchandise at issue is being sold in the U.S. at less than fair value.<sup>16</sup> If merchandise is being sold at less than fair value, then the amount of that difference—the dumping margin—eventually will be the basis for an actual assessment of antidumping duties. Only at that point, while the merchandise is still in liquidation, does ITA apply 19 C.F.R. § 353.55 by determining what amount, if any, of the antidumping duties to be assessed “are or will be paid \* \* \* [or] \* \* \* refunded to the importer by the manufacturer, producer, seller or exporter.” The amount “paid” or “re-

<sup>16</sup> Congress recognized the need for using general concepts such as fair value prior to the actual determination of statutorily defined values. See, H.R. Rep. 317, *supra*, at 59 (“The provision retains the concept of ‘fair value’ for purposes of the investigative phase of an antidumping proceeding. The term fair value is not defined in current law nor in the bill. The Committee intends the concept to be applied essentially as an estimate of ‘foreign market value’ during the period of investigation so as to provide the Authority with greater flexibility in administration of the law.”).

funded" is based on the antidumping duties *to be assessed*, not on the prior deposit of estimated antidumping duties. Thus, if a producer agrees to reimburse all antidumping duties, then the entire amount of antidumping duties to be assessed will be added in determining the dumping margin pursuant to 19 C.F.R. § 353.55, regardless of whether a larger or smaller deposit of estimated antidumping duties has been posted.

It was not improper for ITA to not make any adjustments under 19 C.F.R. § 353.55 or 19 U.S.C. § 1677a(d)(2)(A) for *deposits* of estimated antidumping duties paid by Rhone U.S. Because ITA found no margin, there were no *actual* duties to deduct. The determination upon remand, however, may result in a finding of dumping, in which case the separate issues of whether actual duties should be deducted in calculating final margins may arise.<sup>17</sup>

#### IV. WEIGHTED AVERAGING OF FOREIGN MARKET VALUE

In conducting its annual administrative review, ITA is required to determine the foreign market value of the July 1982 entry of ASM, and determine the amount, if any, by which the foreign market value of that entry exceeds its United States price. 19 U.S.C. § 1675(a)(2) (1982). ITA determined foreign market value by using a weighted average of sales made by Rhone France during July 1982. The use of a monthly weighted average was explained by ITA in the notice of final results as follows:

When during a month, as here, there are numerous home market sales of identical merchandise at varying prices, it is appropriate to use the monthly weighted-average of those home market prices. Accordingly, we have based foreign market value on the weighted-average home market price of all sales of identical merchandise \* \* \* sold in July 1982 and invoiced in August 1982 \* \* \*.

49 Fed. Reg. 43733, 43735 (1984). The use of weighted averaging in cases involving varying prices has been provided for by regulation since 1955. T.D. 53773, 90 Treas. Dec. 93, 96 (1955) (Treasury Regulation Adopted under Antidumping Act of 1921); 19 C.F.R. § 353.20 (1982) (ITA Regulation under Tariff Act of 1930). Averaging has also been provided for by the Tariff Act of 1930 in cases involving a significant number of sales. 19 U.S.C. § 1677b(f) (1982); 19 U.S.C. § 1677-1 (Supp. III 1985).

Plaintiff does not challenge ITA's power to use weighted averages, or even monthly weighted averages, in this particular case. Plaintiff does, however, object to the time period used to compute the monthly weighted average. Plaintiff argues that the monthly period must be limited to "the 30 day period *prior* to the exportation or sale date of the involved entry—not in any part subsequent

<sup>17</sup> ITA implies that 19 C.F.R. § 353.55 may be somewhat punitive and that application of the regulation would be inappropriate here where duties are paid by Rhone U.S., the entity with a direct obligation under U.S. law for the duties. Plaintiff's view of ITA's position on this point is unclear. If this issue arises, it would be helpful if on remand ITA would explain its interpretation of § 353.55 and relate it to 19 U.S.C. § 1677a(d)(2)(A), 19 U.S.C. § 1677(13) and the statutory scheme.

*thereto.*" Thus, plaintiff's position is that ITA exceeded its discretion and authority when it based its monthly weighted average upon the calendar month of July, where the exportation and sales occurred *during* the month of July. Plaintiff's position is based upon the definition of foreign market value, which provides, in part, as follows:

The foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise \* \* \* except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

19 U.S.C. § 1677b(a)(1).

Apparently, plaintiff's reading of the statute relies heavily upon the references to determining foreign market value "at the time of exportation" or "as of the date of such purchase." These references, taken literally, are to specific points in time, and not to periods prior to or after such times.<sup>18</sup> A strictly literal reading of these references, however, would not allow room for the use of averages, regardless of whether those averages were made over periods prior to, or after, the relevant point in time. Such a reading would be inconsistent with Congress' intent in providing for averages in certain cases, and thirty years of administrative regulations and practice under both the Antidumping Act of 1921 and the Tariff Act of 1930 in other cases.

Plaintiff argues that reading the statute to allow weighted averaging over a period of time prior, but not subsequent, to the time of exportation or date of purchase is necessary to prevent manipulation of foreign market prices. According to plaintiff, basing averages upon a calendar month (extending beyond the time of exportation or date of purchase) gives exporters the opportunity to manipulate foreign market value during the balance of the month. Presumably, such manipulation would have to be made through pretended sales or attempts to create a fictitious market.<sup>19</sup> Such situations, however, are already explicitly provided for in the statutory definition of foreign market price and the regulations. 19 U.S.C. § 1677b(a)(1); 19 C.F.R. § 353.18. Plaintiff's interpretation of the statute is not necessary to effectuate the purpose of the antidumping act, and is not the only reasonable interpretation. While ITA might provide an extra measure of protection against manipulation

<sup>18</sup> The phrase "as of" generally refers to a specific time, though it is often used to define a starting point. *Webster's Third New International Dictionary* 129 (1961) provides the following definition for "as of": "at or on (a specific time or date) < the rule takes effect as of July 1 >."

<sup>19</sup> If legitimate sales in the foreign market were made without an intention to create a fictitious market, then such sales would not be the type of "manipulation" that Congress intended to address. Dumping practices may be discontinued by either raising U.S. prices or lowering foreign market prices.

of foreign market value by basing its weighted monthly averages upon a 30 day period prior to the time of exportation or date of purchase, it is not unreasonable for ITA to base such average upon the calendar month within which an exportation or purchase occurred.

#### V. CONCLUSION

The action is remanded for ITA to redetermine the Less-Than-Fair-Value margin, pursuant to its 751 review, 19 U.S.C. § 1675 (1982), in accordance with this opinion. ITA shall file its redetermination with the court within 30 days. Plaintiff will file any comments on the results of the remand within 15 days after the filing of ITA's redetermination, and defendants will respond within 10 days after filing of plaintiff's comments.

So ORDERED.



# ABSTRACTED CLASS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESS
				Item No. and
C87/1	DiCarlo, J. January 6, 1987	Farwest Garments, Inc.	85-5-00652, etc.	Item 383.90 21¢ per lb. p 27.5% Item 379.96 19¢ per lb. p 27.5% Item 379.96 Various rate Item 383.92 12¢ per lb. p 22.3%
C87/2	DiCarlo, J. January 6, 1987	Gund, Inc.	85-6-00389	Item 737.40 10.9%
C87/3	DiCarlo, J. January 6, 1987	Teleflora Products, Inc.	85-11-01589	Item 206.98 5.1%
C87/4	Restani, J. January 8, 1987	Coburn Optical Industries	84-9-01275	Item 709.05 17.5% or 19.
C87/5	Restani, J. January 8, 1987	Kwanasia of America	84-12-01773, etc.	Items 716.10-7 Various rate electronic wa modules Item 760.05 Various rate pens with dip watches

# CLASSIFICATION DECISIONS

ED nd rate	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
	Item No. and rate		
plus	Item 376.56 12.1%	Pacific Trail Sportswear Mills, Inc. v. U.S., 5 CIT 206 and Isod v. U.S., S.O. 86-72	Tacoma Unisex jackets and ladies jackets
plus			
es			
plus			
	Item 737.30 6.8%	Agreed statement of facts	New York Stuffed toys
	Item A207.00 Free of duty	Agreed statement of facts	Los Angeles Birdhouses
9.4%	Item 709.15 Various rates for photocoagulator	Agreed statement of facts	Tampa Laser photocoagulator and slit lamp
	Item 709.05 Various rates for slit lamp		
716.29 es for watch	Item 688.36 5.1% for electronic watch modules	Agreed statement of facts	New York Electronic watch modules and pens with digital watches
es for igital	Item 688.45 or 688.36 Free of duty for pens with digital watches		

U.S. COURT OF INTERNATIONAL TRADE

# ABSTRACTED CLASSIFICATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	
C87/6	Carman, J. January 12, 1967	Topcon Instrument Corp.	84-1-00073	Item 709.05 Various rates	M
C87/7	Reetani, J. January 15, 1967	Federated Equipment & Supply	83-4-00629, etc.	Item 674.60 6.4%	I
C87/8	Reetani, J. January 15, 1967	Coleco Industries, Inc.	84-12-01810	Item 737.95 14.9%	I
C87/9	Carman, J. January 14, 1967	Mattel, Inc.	84-1-0003	Item 737.24 14.8%	I
C87/10	Reetani, J. January 20, 1967	Algoma Tube Corp.	82-8-01094	Item 610.43 11%	I
C87/11	Reetani, J. January 20, 1967	Algoma Steel Corp.	80-10-01721	Item 610.43 11%	I

# DECISIONS — Continued

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
Item No. and rate		
Merchandise not subject to duty as it was never entered into the commerce of the U.S.	Agreed statement of facts	New York Ophthalmic equipment
Item 674.70 3.8%	Lukas America, Inc. v. U.S., S.O. 84-55	Chicago Cutters, spreaders or parts thereof
Item 256.90 7.7%	Childcraft Education Corp., 742 F.2d 1413 (Fed. Cir. 1984)	New York Magic Touch Cards
Item 774.55 Free of duty	Mattel, Inc. v. U.S., S.O. 84-133	Los Angeles Base stands and leg holders
Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oil well casings
Item 610.39 or 610.40 Various rates	Algoma Tube Corp. v. U.S., S.O. 85-89	Sault Ste. Marie Quenched and tempered seamless alloy and non-alloy steel plain-end oil well casings

# ABSTRACTED VALUATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V87/1	Watson, J. January 6, 1987	Texas Instruments, Inc.	82-5-00701, etc.	Constructed value	61.933% of all 807.00
V87/2	Re, C.J. January 7, 1987	Goodline Sportswear, Inc.	76-6-01562	Export value	Apprais entry additi curren
V87/3	Re, C.J. January 7, 1987	Caressa, Inc.	75-5-01243	Export value	Apprais entry includ revalu
V87/4	Re, C.J. January 7, 1987	Pessano Int'l Inc.	77-9-03900	Export value	Apprais entry includ revalu
V87/5	Rao, J. January 8, 1987	Sandvik Conveyor Inc.	81-9-01312, etc.	Transaction value	Invoice of any freigh incide the m of sale
V87/6	Rao, J. January 8, 1987	Sandvik Process Systems, Inc.	82-9-01235, etc.	Transaction value	Invoice of any freigh incide the m of sale

DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
% of entered value (net allowances under item 90)	Agreed statement of facts	Dallas Semiconductor devices
used values shown on papers, less those additions included to reflect currency revaluation	C.B.S. Imports v. U.S., C.D. 4739	New York Not stated
used values shown on papers, less additions added to reflect currency valuation	C.B.S. Imports v. U.S., C.D. 4739	Boston Not stated
used values shown on papers, less additions added to reflect currency valuation	C.B.S. Imports v. U.S., C.D. 4739	New York Not stated
price thereof, exclusive of additions for inland freight and related charges incident to transportation of merchandise from point of origin to port of exportation	Sandvik, Inc. v. U.S., R85/477	New York Steel products
price thereof, exclusive of additions for inland freight and related charges incident to transportation of merchandise from point of origin to port of exportation	Sandvik, Inc. v. U.S., R85/477	New York Steel products

## ABSTRACTED VALUATION I

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
V87/7	Rao, J. January 8, 1987	Sandvik Process Systems, Inc.	83-3-00463, etc.	Transaction value
V87/8	Watson, J. January 13, 1987	Arthur J. Fritz & Co.	R63/6237	Export value
V87/9	Watson J. January 13, 1987	C. Itoh & Co.	R63/3117	Export value
V87/10	Watson J. January 13, 1987	Frank P. Dow Co.	R61/21002	Export value
V87/11	Watson J. January 13, 1987	Imported Rug Associates	R64/17851	Export value
V87/12	Watson J. January 13, 1987	Kalimar, Inc.	R62/2487	Export value
V87/13	Watson J. January 13, 1987	Lang Bros.	R63/6238	Export value
V87/14	Watson J. January 13, 1987	Nichimen	R62/5831, etc.	Export value
V87/15	Watson J. January 13, 1987	Rex Sales	R61/20669, etc.	Export value
V87/16	Watson J. January 13, 1987	Swift Instruments Inc.	R61/9632, etc.	Export value

# DECISIONS — Continued

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
Invoice price thereof, exclusive of any additions for inland freight and related charges incident to transportation of the merchandise from point of sale to port of exportation	Sandvik, Inc. v. U.S., R85/477	New York Steel products
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Seattle Transistor radios
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed	Agreed statement of facts	San Francisco Tuna/brine
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Portland, Or. Transistor radios
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Seattle Rugs
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Binoculars
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Seattle Transistor radios
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Transistor radios
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Crabmeat
Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Binoculars

V87/17	Rao, J. January 14, 1987	Sandvik, Inc.	84-1-00123, etc.	Transaction value
V87/18	Re, C.J. January 16, 1987	Amerex Trading Corp.	73-7-01693	Export value

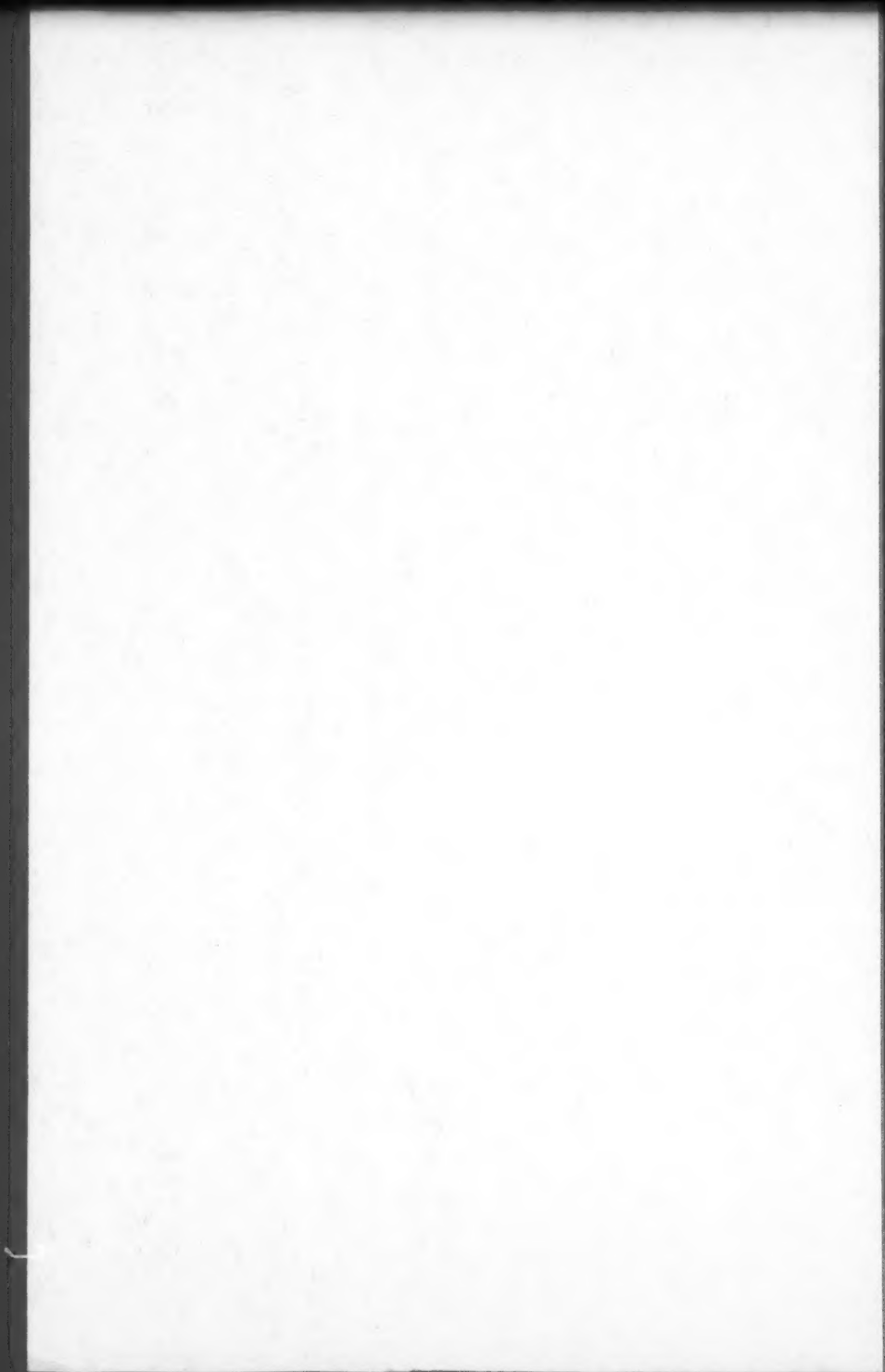
Invoice price thereof, exclusive of any additions for inland freight and related charges incident to transportation of the merchandise from point of sale to port of exportation	Sandvik, Inc. v. U.S., R85/477	New York Steel products
Appraised values shown on entry papers, less additions included to reflect currency revaluation	C.B.S. Imports v. U.S., C.D. 4739	New York Not stated





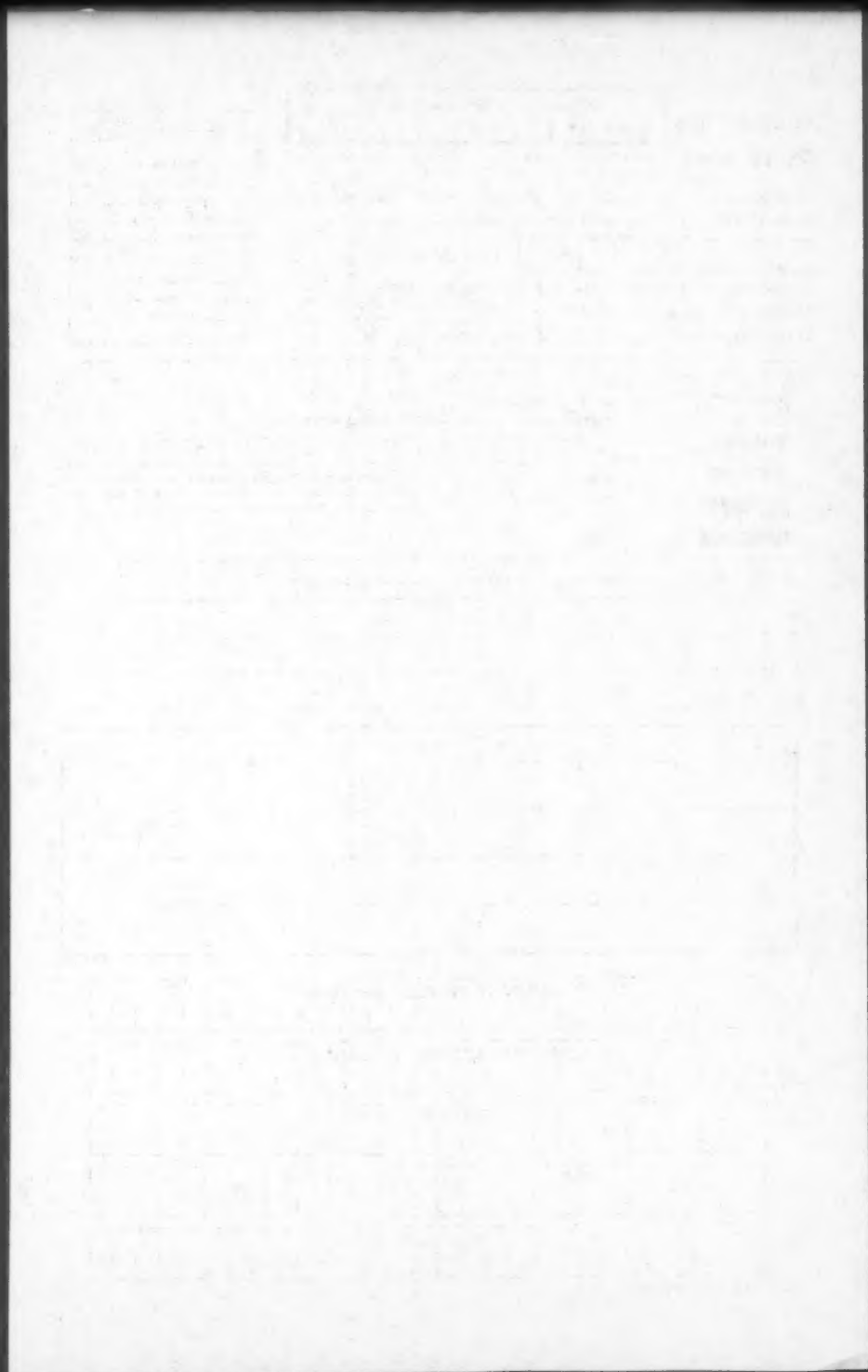












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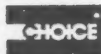


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